92

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In The
Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO,
SERGEANT JEFF BARRY,
OFFICER MICHELLE LIDDICOET, and ALEX FAGAN,

Petitioners,

v.

RODEL RODIS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. 18 U.S.C. section 472 makes it illegal to pass a counterfeit bill "with intent to defraud." Is probable cause to arrest an individual for a suspected violation of this statute established once the individual attempts to pass a counterfeit bill, as the Eleventh and Fifth Circuits have concluded, or must the arresting officer develop additional, independent evidence of "intent to defraud," above and beyond the intent inferred from the passing of the counterfeit bill, before arresting the suspect, as the Ninth Circuit held in the case below?

2. Did the Ninth Circuit err in denying qualified immunity to officers who arrested a suspect for violation of 18 U.S.C. section 472, based on their reasonable belief that he had attempted to pass a counterfeit bill, where the only cases on point at the time of the arrest had concluded that an attempt to pass a counterfeit bill – even without additional evidence of intent – was sufficient to establish probable cause and where no court had ever held that additional evidence of intent was required? (A similar question relating to qualified immunity is pending before the Court in *Pearson v. Callahan*, No. 07-751.)

3. Should *Saucier v. Katz*, 533 U.S. 194 (2001), be overruled? (This question is pending before the Court in *Pearson v. Callahan*, No. 07-751.)

PARTIES TO THE PROCEEDING

Petitioners are two individual law enforcement officers (Sergeant Jeff Barry and Officer Michelle Liddicoet), the City and County of San Francisco (a California municipal corporation), and former Chief of Police Alex Fagan, sued in his official capacity only.

Respondent is Rodel Rodis, an individual.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS/ORDERS BELOW	1
JURISDICTIONAL STATEMENT	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	13
I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUITS OVER WHETHER INDEPENDENT EVIDENCE OF INTENT TO DEFRAUD, BEYOND THE ATTEMPT TO PASS THE COUNTERFEIT BILL ITSELF, IS REQUIRED TO SUPPORT PROBABLE CAUSE TO ARREST AN INDIVIDUAL FOR SUSPECTED VIOLATION OF 18 U.S.C. SECTION 472	13
II. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE NINTH CIRCUIT'S ERRONEOUS DENIAL OF QUALIFIED IMMUNITY	18

TABLE OF CONTENTS – Continued

Page

III. THE COURT SHOULD GRANT CERTIORARI TO RECEIVE THE CITY'S INPUT ON WHETHER, AND THE EXTENT TO WHICH, *SAUCIER V. KATZ* SHOULD BE OVERRULED 22

CONCLUSION 27

APPENDICES

1) Ninth Circuit Opinion dated August 28, 2007 ..... App. 1

2) District Court Order re Summary Judgment dated March 22, 2005 ..... App. 33

3) Ninth Circuit Order dated September 10, 2007, Extending Deadline to File Petition for Rehearing ..... App. 50

4) Ninth Circuit Order dated February 6, 2008, Denying Rehearing and Rehearing En Banc ..... App. 51

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Baker v. McCollan, 443 U.S. 137 (1979) 15

Bates v. United States, 352 F.2d 399 (9th Cir. 1965) 13, 18

Behrens v. Pelletier, 516 U.S. 299 (1996) 2

Brosseau v. Haugen, 543 U.S. 194 (2004) 5, 20

City of Los Angeles v. Heller, 475 U.S. 796 (1986). 24

George v. City of Long Beach, 973 F.2d 706 (9th Cir. 1992) 26

Illinois v. Gates, 462 U.S. 213 (1983) 10

Marks v. Carmody, 234 F.3d 1006 (7th Cir. 2000) 15

Mitchell v. Forsyth, 472 U.S. 511 (1985) 2

Monell v. Department of Social Servs., 436 U.S. 658 (1978) 23, 24, 25, 26, 27

Owen v. City of Independence, Mo., 445 U.S. 622 (1980) 24

Pearson v. Callahan, No. 07-751 ..... 5, 21, 22, 27

Salazar v. Burresch, 47 F. Supp. 2d 1105 (C.D. Cal. 1999) 26

Saucier v. Katz, 533 U.S. 194 (2001) ..... *passim*

United States v. Allison, 616 F.2d 779 (5th Cir. 1980) 13, 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Blum, 432 F.2d 250 (9th Cir. 1970) 13, 18

United States v. Everett, 719 F.2d 1119 (11th Cir. 1983) 4, 13, 18

United States v. Ford, 461 F.2d 534 (9th Cir. 1972) 13, 18

United States v. Hernandez, 825 F.2d 846 (5th Cir. 1987) 4, 13, 18

United States v. Mayo, 394 F.3d 1271 (9th Cir. 2005) 15

FEDERAL STATUTES & CONSTITUTIONAL PROVISIONS

18 U.S.C. § 472 ..... *passim*

18 U.S.C. § 474 14

28 U.S.C. § 1254 2

28 U.S.C. § 1291 2

28 U.S.C. § 1331 2

42 U.S.C. § 1983 ..... 2, 8, 23, 24, 27

U.S. Const. amend. IV 2, 8, 9, 19, 21

STATE CASES

Asgari v. City of Los Angeles, 937 P.2d 273 (Cal. 1997) 26

Edson v. City of Anaheim, 74 Cal. Rptr. 2d 614 (Cal. App. 1998) 25

TABLE OF AUTHORITIES – Continued

Page

Tom v. Voida, 654 N.E.2d 776 (Ind. App. 1995).....26

VanVorous v. Burmeister, 687 N.W.2d 132 (Mich. App. 2004).....26

Venegas v. County of Los Angeles, 63 Cal. Rptr. 3d 741 (Cal. App. 2007).....26

White v. Martin, 30 Cal. Rptr. 367 (Cal. App. 1963).....25

Williams v. City of Jacksonville, 599 S.E.2d 422 (N.C. App. 2004).....26

STATE STATUTES & CODES

California Penal Code § 847.....26

OPINIONS/ORDERS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, dated August 28, 2007, is published at 499 F.3d 1094 and is reprinted in the Appendix at Pet. App. 1.

The order of the United States District Court for the Northern District of California, dated March 22, 2005, can be found at 2004 WL 3246273 (N.D. Cal.), and is reprinted in the Appendix at Pet. App. 33.

The order of the court of appeals, dated September 10, 2007, extending the deadline to petition for rehearing and rehearing en banc is reprinted in the Appendix at Pet. App. 50.

The order of the court of appeals, dated February 6, 2008, denying petitioners' request for rehearing and rehearing en banc is reprinted in the Appendix at Pet. App. 51.

JURISDICTIONAL STATEMENT

Petitioners seek review of the August 28, 2007, opinion of the court of appeals affirming the district court's denial of qualified immunity to petitioners Sergeant Jeff Barry and Officer Michelle Liddicoet. After obtaining an extension of the deadline to petition for rehearing and rehearing en banc, petitioners filed the petition on October 12, 2007. The court of appeals denied the petition on February 6, 2008.

The statutory basis for this Court's jurisdiction is 28 U.S.C. section 1254. The court of appeals derived jurisdiction from 28 U.S.C. section 1291, because an order denying qualified immunity is an appealable collateral order. *See Behrens v. Pelletier*, 516 U.S. 299 (1996); *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The district court derived jurisdiction from 28 U.S.C. section 1331, because Rodis alleged that his federal constitutional rights had been violated by petitioners' actions and raised a claim under 42 U.S.C. section 1983.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. section 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person

> within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

18 U.S.C. section 472 states:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both.

STATEMENT

In the decision below, a divided panel of the Ninth Circuit held that an officer may not arrest an individual on suspicion of passing a counterfeit bill unless the officer has evidence of "intent to defraud" above and beyond the intent inferred from the passing of the bill. This holding creates a split with the Eleventh and Fifth Circuits, both of which have made clear that an attempt to pass a counterfeit bill is

sufficient to establish probable cause to arrest. *See United States v. Everett*, 719 F.2d 1119, 1120 (11th Cir. 1983) ("While intent is an element of the crime which must be proved at trial, it is not necessary in order to establish probable cause to arrest. The passing of a counterfeit note coupled with an identification of the person who passed the note furnishes probable cause to arrest the individual identified as passing the note."); *United States v. Hernandez*, 825 F.2d 846, 849 (5th Cir. 1987) ("Generally, probable cause to arrest for the offense of passing a counterfeit note is established by circumstances showing the passing of a counterfeit note coupled with an identification of the individual who passed the note."). This circuit split is of great consequence because it will impede the ability of law enforcement agencies to enforce the federal counterfeiting statute effectively and uniformly. The Court should grant certiorari to resolve the split and correct the Ninth Circuit's error.

The Ninth Circuit also erred in denying qualified immunity to the arresting officers. Every decision in existence at the time of the arrest had held or implied that officers may arrest an individual on suspicion of passing a counterfeit bill when the individual attempts to pass the bill, and that no additional evidence of intent to defraud is required to establish probable cause. Yet, despite that case law, the Ninth Circuit held that the officers had violated Rodis's clearly established right not to be arrested without additional evidence of intent. It did so by defining the right at the highest level of generality possible, in

direct contravention of this Court's prior rulings in *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001), and *Brosseau v. Haugen*, 543 U.S. 194 (2004). As such, the Ninth Circuit's error is identical to that of the Tenth Circuit in *Pearson v. Callahan*, No. 07-751, in which the Court recently granted certiorari.

If the only error in the decision below were the denial of qualified immunity, petitioners would request that the Court hold the petition for a decision in *Pearson*. However, because the Ninth Circuit's ruling also creates a certworthy split on the probable cause requirement for 18 U.S.C. section 472, petitioners respectfully request that the Court grant certiorari in this case, and calendar it for argument with *Pearson* so that the Court may address the overlapping qualified immunity issue simultaneously. An additional benefit to calendaring the petition for argument with *Pearson* is that the City and County of San Francisco, which is annually named along with its law enforcement officers in dozens of lawsuits that implicate qualified immunity, can provide the Court with guidance on the third question presented in *Pearson* and in this petition: whether *Saucier* should be overruled. The City's experience suggests that although the Court should overrule *Saucier* to the extent it *requires* courts to adjudicate the underlying constitutional issue before turning to qualified immunity, the Court should not *preclude* lower courts from doing so, because the simultaneous resolution of both issues often promotes judicial economy and allows municipalities to avoid the unnecessary expense of litigating

constitutional and state-law claims that are clearly meritless.

* * *

1. On February 17, 2003, respondent Rodel Rodis attempted to make a purchase at a Walgreens drugstore in San Francisco with a $100 bill. The cashier suspected the bill was counterfeit because of its odd texture and reported her suspicion to the store manager. The manager, who handles multiple $100 bills every day, examined the bill, compared it to another $100 bill, observed that the bill lacked a magnetic strip and watermark, and therefore agreed with the clerk's suspicion that the bill was counterfeit.

The manager then called 911 to summon the police and informed the 911 dispatcher that he suspected the bill was counterfeit. Several San Francisco police officers – including Sergeant Jeff Barry, Officer Michelle Liddicoet, Officer James Nguyen, and Officer Barbara Dullea – arrived at the scene in response to that dispatch. The officers arrested Rodis, basing probable cause on several facts. First, the officers independently examined the bill by touching it and inspecting it visually. Second, the Walgreens employees, experienced in handling currency, communicated their suspicions about the genuineness of the bill. Officer Nguyen spoke with the manager and cashier, who expressed their belief that the bill was counterfeit. The cashier informed Officer Nguyen that Rodis had used the $100 bill to pay for a few small items.

The manager told Officer Nguyen he had compared the bill to another $100 bill from the same year.

Based on these facts, the officers determined the bill likely was counterfeit and decided to investigate further by contacting the United States Secret Service for guidance. The San Francisco Police Department has access to a Secret Service hotline for such inquiries, and officers are trained to contact the Secret Service to confirm the authenticity or lack thereof of suspect bills.

The officers conducted this portion of their investigation from the police station. Conducting such an investigation at the Walgreens store was impractical because the Walgreens office was very small and cramped. In addition, conducting the investigation at the police station would be more effective and less embarrassing for Rodis, given the potential delay in hearing back from the Secret Service. Under standard procedures governing arrests, the officers handcuffed Rodis and transported him to the police station.

After arriving at the station, Officer Nguyen called and left a message for the Secret Service and received a return call from an agent twenty or thirty minutes later. After interviewing Officer Nguyen about the bill, the Secret Service agent informed Officer Nguyen that the bill likely was genuine. Upon learning this information, the officers immediately released Rodis, removed his handcuffs, and drove him back to the Walgreens store in the front seat of the

police car. The officers returned the $100 bill to Rodis. The entire incident lasted approximately one hour.

2. On October 1, 2003, Rodis filed suit in the Superior Court of California for the County of San Francisco, against Defendants City and County of San Francisco, then-Chief of Police Alex Fagan (in his official capacity only), Sergeant Barry, and Officer Liddicoet. The complaint alleged a cause of action under 42 U.S.C. section 1983, for violation of Rodis's Fourth Amendment rights, and state-law claims as well. After the City was served, it removed the case to the United States District Court for the Northern District of California.

Petitioners moved for summary judgment, and on March 22, 2005, the district court granted the motion in part and denied it in part. Pertinent here, the district court held that Rodis had a viable claim against the individual officers for violation of his rights under the Fourth Amendment and further held that those rights were clearly established at the time of the arrest. The district court thus denied the officers' request for qualified immunity. Pet. App. 33-49.

Petitioners appealed the denial of qualified immunity, and on August 28, 2007, a divided three-judge panel of the Ninth Circuit affirmed the denial. The majority opinion, written by Judge Dorothy Nelson (and joined by District Judge Cormac Carney, sitting by designation), held that even though there was probable cause to believe Rodis had attempted to

pass a counterfeit bill, the officers violated his clearly established rights by arresting him without additional, independent evidence that he had intended to defraud Walgreens:

> [A]rresting Rodis without *any* evidence he intended to use the bill to defraud the store or that he knew (or believed) the bill was fake was a violation of his Fourth Amendment rights. Further, it was clearly established at the time of the arrest that Defendants' conduct was unlawful.

Pet. App. 7-8.

In concluding the officers lacked probable cause *to arrest*, the majority stressed that to *obtain a conviction at trial*, the government must independently prove intent to defraud. Pet. App. 9-10. The majority acknowledged the general rule that officers need not have probable cause as to each element of a crime to effect a legal arrest, Pet. App. 11, but then held that "at least *some* evidence of Rodis's alleged intent to defraud would have been required to establish probable cause." Pet. App. 10 n.2; *see also* Pet. App. 13.[1]

Turning to the qualified immunity question, the majority concluded that the requirement that officers

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[1] The majority placed special emphasis on one factor that "decreased the probability that Rodis violated section 472," namely, that the officers knew that he had high social standing in the community and that he was an attorney and an elected member of the San Francisco Community College Board. Pet. App. 12-13.

develop additional evidence of intent before making a counterfeiting arrest was clearly established at the time of Rodis's arrest. The majority did not cite any cases to support the conclusion that the law was clearly established at the time. Instead, it relied on the "fluidity" of the probable cause analysis:

> [I]t was well established at the time of Rodis's arrest that "probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." . . . Based on the totality of the circumstances, no prudent officer reasonably could have concluded there was a fair probability that Rodis violated § 472 or any other offense.

Pet. App. 15-16 (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)).

The majority acknowledged the existence of cases in the Ninth Circuit and elsewhere that explicitly or implicitly had validated counterfeiting arrests without evidence of intent beyond the intent inferred from the act of passing a counterfeit bill. But, it rejected those cases as being either insufficiently specific, too short, too old, or not binding because they were from other circuits. Thus, according to the majority, the cases did not undermine the conclusion that the intent requirement for counterfeiting arrests was clearly established at the time of the arrest. Pet. App. 16-17 & n.5.

3. Judge Consuelo Callahan dissented from the panel decision. Judge Callahan first reasoned that the officers had probable cause because they had a basis for believing that the odd bill was counterfeit, based on the reports from Walgreens staff and the officers' own examination of the bill. Pet. App. 20-21. Judge Callahan noted that by requiring additional evidence of intent to sustain a counterfeiting arrest, "the majority opinion improperly imposes the government's burden of proof at trial on the probable cause inquiry." Pet. App. 22-23.

Judge Callahan described the problems with requiring officers to have additional evidence of intent before effecting a legal counterfeiting arrest:

> Imposing a requirement that asks officers to read criminals' minds to discern their subjective knowledge and intent is not practical or grounded in reality. Intent to defraud is often established through evidence concerning knowledge such as additional counterfeit bills, reproduction equipment, plates, ledgers, and other evidence that officers would no longer be able to gather incident to arrest or through a search warrant.

Pet. App. 26.

Judge Callahan then disagreed with Judge Nelson's conclusion that the requirement of additional evidence of intent was clearly established at the time of Rodis's arrest:

> The majority cites to no case specifically requiring that officers have explicit evidence of a suspect's subjective intent to defraud before they have probable cause to arrest on suspicion of violating 18 U.S.C. § 472. This lack of precedent to support the majority's approach is telling. . . . In my view, the case law allowing officers to infer the intent to defraud from the attempted passing of the counterfeit note is sufficient to establish probable cause was the clearly established law prior to this decision. We cannot expect the officers to anticipate the majority's ruling that they should have had explicit and conclusive evidence of the suspect's subjective intent to defraud prior to arrest, because it is found nowhere else in any federal court's jurisprudence concerning probable cause to arrest under 18 U.S.C. § 472.

Pet. App. 31-32.

4. The Ninth Circuit denied petitioners' timely Petition for Rehearing and Rehearing En Banc on February 6, 2008. Pet. App. 51-52.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUITS OVER WHETHER INDEPENDENT EVIDENCE OF INTENT TO DEFRAUD, BEYOND THE ATTEMPT TO PASS THE COUNTERFEIT BILL ITSELF, IS REQUIRED TO SUPPORT PROBABLE CAUSE TO ARREST AN INDIVIDUAL FOR SUSPECTED VIOLATION OF 18 U.S.C. SECTION 472.

The Court should grant certiorari to resolve the circuit split that the Ninth Circuit created by holding that petitioners lacked probable cause to arrest Rodis because of the lack of evidence of intent to defraud beyond the act itself of passing a counterfeit bill. The Ninth Circuit's holding is categorical in nature: "Without at least some evidence regarding the knowledge or intent elements of the crime, probable cause is necessarily lacking." Pet. App. 13. Thus, if the Ninth Circuit's ruling stands, additional evidence of knowledge or intent will be required in every counterfeiting arrest in the western United States for probable cause to exist.

This rule is inconsistent with the rule in other circuits. The Fifth and Eleventh Circuits have concluded that evidence of intent to defraud, beyond the intent inferred from the act of passing the bill, is not required to have probable cause to arrest for attempting to pass a counterfeit bill. *See Everett*, 719 F.2d at 1120 ("While intent is an element of the crime which

must be proved at trial, it is not necessary in order to establish probable cause to arrest. The passing of a counterfeit note coupled with an identification of the person who passed the note furnishes probable cause to arrest the individual identified as passing the note."); *Hernandez*, 825 F.2d at 849 ("Generally, probable cause to arrest for the offense of passing a counterfeit note is established by circumstances showing the passing of a counterfeit note coupled with an identification of the individual who passed the note."); *United States v. Allison*, 616 F.2d 779, 782 (5th Cir. 1980) ("Although mere possession of counterfeit money is not a crime, when possession is coupled with reliable information that the possessor has attempted to pass the bill as genuine, the officer in the field is justified in concluding that an offense has been committed."). Indeed, the approach of the majority below is arguably inconsistent with the Ninth Circuit's own past rulings, which have strongly implied that evidence of intent beyond the passing of the bill is not required for counterfeiting arrests. *See United States v. Ford*, 461 F.2d 534 (9th Cir. 1972); *United States v. Blum*, 432 F.2d 250 (9th Cir. 1970); *cf. Bates v. United States*, 352 F.2d 399 (9th Cir. 1965) (relating to 18 U.S.C. section 474, which has intent language identical to section 472).[2]

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[2] In concluding that there was no evidence of intent to defraud in this case, the majority assumed that the act of passing a counterfeit bill has no evidentiary bearing on whether the individual possessed such an intent. This assumption, in

(Continued on following page)

The decision below is also in tension with this Court's holding that an officer is not required to investigate every claim of innocence and every potential defense "such as lack of requisite intent" before making an arrest. *See Baker v. McCollan*, 443 U.S. 137, 145-46 (1979); *see also United States v. Mayo*, 394 F.3d 1271, 1276 (9th Cir. 2005) (affirming probable cause for crime requiring intent to defraud and reasoning: "Although Mayo told the officers that he was buying the car and did not realize that the sticker was on the license plate, the officers did not have to accept Mayo's version of the facts. The standard for probable cause is not so demanding."); *Marks v. Carmody*, 234 F.3d 1006, 1009 (7th Cir. 2000) ("The fact that Marks had alerted the officers to possible defenses he might have had to the crime does not change this result [i.e., a finding of probable cause]. . . . [The officers did not] need to accept as established the evidence Marks had proffered that tended to show that he did not act with the requisite

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itself, is erroneous. Just as a factfinder may infer from the fact that a person is driving a stolen vehicle that he did, in fact, steal the vehicle, a factfinder may infer from the fact that a person attempted to pass a counterfeit bill that he intended to defraud the person to whom he passed the bill. This error, however, is beside the point for purposes of this petition for certiorari. The bottom line is that the Ninth Circuit held that an officer needs something more than the act of passing a counterfeit bill before he or she may arrest a suspect, while the rule in the Eleventh and Fifth Circuits is that the act of passing the bill alone is sufficient to establish probable cause.

intent to defraud the Bechars. Issues of mental state and credibility are for judges and juries to decide.").

The Ninth Circuit's new rule creates significant practical problems for enforcement of the counterfeiting laws. While *convictions* for passing counterfeit currency may require independent proof of intent, it makes sense to permit officers to make counterfeiting *arrests* without proof of intent beyond the act of passing the counterfeit currency. Requiring such additional proof of intent before arrest would impede the effective enforcement of the counterfeiting laws. Intent is difficult to ascertain, especially during the short periods of time that officers have to make arrest decisions based on limited information. Accordingly, the Ninth Circuit's approach will provide criminals with an easy way to game the system, secure in the knowledge that they cannot be arrested unless officers have probable cause – independent of the passing of the bill – to believe that they intended to defraud. Criminals will be able take simple steps to undermine any conclusion on the scene that they intended to defraud and thus defeat probable cause, even if they unquestionably passed counterfeit currency. Judge Callahan described this problem in her dissent:

> Applying the majority's newly announced standard will also result in absurd results. If a suspect simply says that he does not know if the bill is real or fake, or if he carries around a real bill and offers to substitute it for the counterfeit one, officers may not

> arrest him to investigate the probable unlawful conduct. In the case of a clever criminal who is skilled at lying, officers would be powerless to arrest the suspect even when he attempts to pass a clearly counterfeit bill, if the suspect verbally disavows knowledge or intent and pays with a legitimate bill. A criminal could test the counterfeit detection skills of clerks, bartenders, and other consumers at will without fear of arrest.

Pet. App. 26.

The circuit split created by the decision below, if left unresolved, will be particularly harmful because enforcement of the federal counterfeiting laws will be uneven, with law enforcement officers in the Ninth Circuit being significantly limited in their ability to conduct counterfeiting investigations and to arrest suspects who have passed counterfeit currency. Uneven enforcement of the counterfeiting laws could have significant ramifications for the ability of the government to ensure the integrity of the currency and would particularly hamper multi-state investigations of counterfeiting operations, because authorities would have to apply different investigatory and arrest standards in different circuits, even as part of a single investigation.

Additional percolation among the courts of appeals is unnecessary in light of the significance of the issue and the obviousness of the error committed by the majority below. The probable cause requirement for counterfeiting arrests has been agreed upon in

almost forty years' worth of case law on this issue. The Ninth Circuit's brand new approach – that "[w]ithout at least some evidence regarding the knowledge or intent elements of the crime, probable cause is necessarily lacking," Pet. App. 13 – creates significant uncertainty, will deter officers from aggressively enforcing federal counterfeiting laws, and therefore merits immediate review by this Court to resolve the conflict.

II. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE NINTH CIRCUIT'S ERRONEOUS DENIAL OF QUALIFIED IMMUNITY.

In denying the officers qualified immunity, the majority below did not cite a single case that has ever held that officers must have evidence of intent, above and beyond the passing of the bill, in order to arrest for passing counterfeit currency. The majority noted the existence of cases that have held or strongly implied that further evidence of intent was *not* required, but the majority rejected those cases because they were either too vague, too old, too short, or not binding because they were out of circuit. These cases included Ninth Circuit authority, as well as authority from other circuits. *See Hernandez*, 825 F.2d at 849; *Everett*, 719 F.2d 1119; *Allison*, 616 F.2d at 782; *Ford*, 461 F.2d 534; *Blum*, 432 F.2d 250; *Bates*, 352 F.2d 399.

The court then reasoned that despite the lack of any precedent holding that officers needed evidence of intent beyond the passing of the bill in order to arrest, qualified immunity did not apply because "it was well established at the time of Rodis's arrest that probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." Pet. App. 15 (quotations omitted).

This rationale – that because it was clearly established that probable cause is a "fluid concept," it was therefore clearly established that evidence of intent beyond the passing of the bill was required to arrest for passing counterfeit currency – is exactly the kind of reasoning that this Court repeatedly has forbade, namely, denying qualified immunity because a broad principle of law was clearly established:

> [T]here is no doubt that *Graham v. Connor* . . . clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized . . . that the right the official is alleged to have violated must have been clearly established in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . The relevant, dispositive inquiry in determining

> whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

Saucier, 533 U.S. at 201-02 (citation and quotations omitted).

This Court recently reiterated *Saucier*'s admonition in summarily reversing a misapplication of qualified immunity by the Ninth Circuit that was very similar to the majority's ruling in this case. In *Brosseau*, the Court stressed the importance of focusing on the specific factual context in assessing whether a right is clearly established, as opposed to finding a right clearly established based on a general principle, in that case the principle that excessive force is impermissible. 543 U.S. at 198 (stating that assessment of whether conduct violates clearly established law "must be undertaken in light of the specific context of the case, not as a broad general proposition") (citation omitted). In finding qualified immunity in *Brosseau*, the Court canvassed the law in contextually similar cases to determine whether the cases clearly established that the conduct was prohibited. The Court concluded that the cases, taken together, did not clearly establish the conduct's illegality. *See id.* at 200-01.

In this case, the Ninth Circuit disregarded *Brosseau* and *Saucier*'s articulation of what "clearly established" means and defined the concept at such a high level that it is hard to imagine how any officer

being sued for false arrest would be able to claim qualified immunity. The Ninth Circuit's holding, in essence, was that because probable cause is based on the totality of the circumstances and incapable of precise definition, an officer is always on notice that for any given set of facts, a judge may decide that the circumstances did not give rise to probable cause. The officer, of course, has no way of predicting what a judge or panel of judges will do, but because the officer knows that a judge may decide that the arrest is illegal, the officer is not immune.

The Court recently granted certiorari in *Pearson v. Callahan*, No. 07-751, on this same issue. In *Pearson*, the Tenth Circuit denied qualified immunity to officers on a Fourth Amendment search issue even though no court had ever held that the type of search they had conducted was illegal. As in this case, the Tenth Circuit denied qualified immunity by defining the constitutional right at the highest level of generality possible, rather than with reference to contextually similar cases, and held that because those broad principles were clearly established qualified immunity did not apply. And, as in this case, the Tenth Circuit denied qualified immunity even though the only case law on point at the time of the arrest cut in favor of the officers' actions.

If the only error by the majority below were on qualified immunity, petitioners would simply request that the Court hold the petition for a decision in *Pearson*. However, because the decision below also creates a split on the probable cause requirement for

a violation of 18 U.S.C. section 472, petitioners respectfully request that the Court grant the petition and calendar the case for argument with *Pearson*, so that the Court may consider the qualified immunity issues presented by both cases concurrently, while considering the underlying constitutional questions separately. Furthermore, as discussed below, petitioners believe that the City and County of San Francisco's participation would assist the Court in its consideration of the third question presented in *Pearson* and this petition, namely, whether *Saucier* should be overruled.[3]

III. THE COURT SHOULD GRANT CERTIORARI TO RECEIVE THE CITY'S INPUT ON WHETHER, AND THE EXTENT TO WHICH, *SAUCIER V. KATZ* SHOULD BE OVERRULED.

In granting certiorari in *Pearson v. Callahan*, No. 07-751, the Court asked the parties to address whether *Saucier* should be overruled. This case presents a vehicle for addressing that question as well. Moreover, the City and County of San Francisco – which along with its law enforcement officers is

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[3] If, in the alternative, the Court opts to hold this petition for a decision in *Pearson*, the result of a reversal of the Tenth Circuit in *Pearson* very well could be to summarily reverse the decision below in this matter (rather than to grant, vacate and remand), given that the qualified immunity issues presented by the two cases are virtually identical.

named in approximately thirty-five section 1983 cases per year, which routinely litigates qualified immunity in the district court and court of appeals, and which is keenly aware of the practical advantages and disadvantages of the *Saucier* rule – is in an ideal position to brief and evaluate the key issues that the Court will face in deciding the future of *Saucier*.

The City's experience suggests that although the Court should overrule *Saucier* to the extent it *requires* courts of appeals, on interlocutory qualified immunity review, to decide substantive constitutional issues before turning to the question of qualified immunity, the Court should not *preclude* courts of appeals from doing so in certain cases. Allowing courts of appeals discretion to apply the *Saucier* two-step process can be particularly useful in cases where an interlocutory appellate ruling eliminating a non-meritorious federal constitutional claim against officers will also result in the elimination of equally non-meritorious *Monell* and state-law claims that would otherwise, on remand, proceed through lengthy, unnecessary, and expensive litigation. Permitting courts of appeals to turn first to the underlying constitutional issue allows for more efficient disposition of entire cases that clearly have no merit, rather than issuing an initial ruling on qualified immunity that forces parties, on remand, to litigate further federal and state claims related to the alleged constitutional violation.

This case highlights some of the potential disadvantages of categorically discarding the current two-step analysis under *Saucier* altogether. Imagine first that, instead of ruling in Rodis's favor, the Ninth Circuit had ruled in favor of the officers on the qualified immunity question *without* addressing the underlying constitutional issue. Such a ruling would have left numerous claims for the district court to adjudicate on remand, and would have wasted judicial and litigant resources as the parties litigated a meritless claim.

For example, Rodis made a section 1983 claim against municipal defendants, specifically, the City and County of San Francisco and its Chief of Police, under *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). Such a claim cannot be disposed of pursuant to a claim of qualified immunity, which is a defense available only to individual defendants. *See Owen v. City of Independence, Mo.*, 445 U.S. 622, 650 (1980). However, if the court of appeals, on interlocutory appeal, were to conclude that no constitutional violation had occurred, the *Monell* claim automatically would be disposed of because a constitutional violation is an indispensable predicate to a *Monell* claim. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). While the claim also could be disposed of by a showing that there was no municipal policy that was the moving force behind the violation, *see Monell*, 436 U.S. 658, it would be more efficient for such a claim to be disposed of on the basis that there was no underlying constitutional violation. Thus, to the

extent that individual defendants challenge a denial of qualified immunity as part of an interlocutory appeal, a reviewing court proceeding according to *Saucier*'s two-step analysis might rule on this possibly dispositive issue – i.e., the lack of a constitutional violation – and thus avoid an unnecessary trial on municipal liability under *Monell*. Litigating a *Monell* claim can consume enormous judicial and municipal resources, both in discovery and trial, given the focus of such a claim on systemic and long-term policies, practices, and customs of frequently large municipal entities. Avoiding unnecessary discovery and trial in non-meritorious *Monell* claims thus would be a positive result.

Likewise, Rodis asserted state-law claims for false arrest and battery against petitioners. These claims, too, could be efficiently dismissed where a court proceeding according to the *Saucier* two-step analysis determined that there was no constitutional violation, in light of the frequent overlap of elements between federal constitutional claims and state-law claims. For example, in California, as in various other states, false arrest claims against officers and battery claims arising from officers' allegedly unlawful use of force are governed by the same standards as under federal law: for a false arrest claim, a plaintiff must establish that the officer lacked probable cause, and for a battery claim, a plaintiff must prove that the force used was objectively unreasonable. *See Edson v. City of Anaheim,* 74 Cal. Rptr. 2d 614, 617 (Cal. App. 1998) (battery); *White v. Martin*, 30 Cal. Rptr. 367,

368 (Cal. App. 1963) (false arrest); *see also VanVorous v. Burmeister*, 687 N.W.2d 132, 142-43 (Mich. App. 2004); *Williams v. City of Jacksonville*, 599 S.E.2d 422, 428-31 (N.C. App. 2004); *Tom v. Voida*, 654 N.E.2d 776, 784-85 (Ind. App. 1995).

However, qualified immunity may or may not be a defense to state-law claims. *Compare* Cal. Penal Code § 847(b)(1) (providing immunity from false arrest claims where "[t]he arrest was lawful, or the peace officer, at the time of the arrest, had reasonable cause to believe the arrest was lawful."); *George v. City of Long Beach,* 973 F.2d 706, 710 (9th Cir. 1992); *and Salazar v. Burresch*, 47 F. Supp. 2d 1105, 1116 n.11 (C.D. Cal. 1999), *with Venegas v. County of Los Angeles*, 63 Cal. Rptr. 3d 741, 751 (Cal. App. 2007) (no qualified immunity for state civil rights statute claims); *and Asgari v. City of Los Angeles*, 937 P.2d 273, 280-81 (Cal. 1997) (noting differences between federal and California immunities). Thus, a decision that skipped the first *Saucier* step would not dispose of state-law claims in various states even if it was clear that no constitutional violation – and hence no state-law tort – had occurred. Such a result could lead to unnecessary and wasteful litigation of non-meritorious state-law claims.

In contrast, had the Ninth Circuit decided the case in favor of the officers after applying *Saucier*'s two-step approach and concluded that no constitutional violation had occurred, such a ruling would have disposed of Rodis's additional claims – his *Monell* claim for municipal liability and his state-law

claims. It would be of great benefit to district courts – and to cash-strapped municipalities that are often forced to defend unmeritorious civil-rights and state-law claims in long, drawn-out litigation – to allow courts of appeals the discretion to decide the underlying constitutional question in some qualified immunity cases, particularly those where the constitutional claim is clearly lacking in merit and where a ruling on the constitutional claim could eliminate non-meritorious *Monell* and state-law claims. Petitioners respectfully submit that, given the City and County of San Francisco's experience in this and many other section 1983 cases, petitioners' participation on this issue would assist the Court in its evaluation of the extent to which it should overrule *Saucier*.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and calendar the case for argument with *Pearson*.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RODEL E. RODIS,

Plaintiff-Appellee,

v.

CITY AND COUNTY OF SAN FRANCISCO, a municipality; LIDDICOET, Officer, San Francisco Police Officer; BARRY, Sergeant, San Francisco Police Sargeant; ALEX FAGAN, San Francisco Police Chief,

Defendants-Appellants,

and

SAN FRANCISCO POLICE DEPARTMENT,

Defendant.

No. 05-15522

D.C. No. CV-04-00314-MMC

OPINION

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted
April 20, 2007 – San Francisco, California

Filed August 28, 2007

Before: Dorothy W. Nelson and
Consuelo M. Callahan, Circuit Judges,
and Cormac J. Carney,* District Judge.

Opinion by Judge D.W. Nelson;
Dissent by Judge Callahan

COUNSEL

Scott D. Wiener of San Francisco, California, briefed and argued for the defendants-appellants.

Lawrence W. Fasano, Jr. of San Francisco, California, briefed and argued for the plaintiff-appellee.

OPINION

D.W. NELSON, Circuit Judge:

Rodel E. Rodis brought suit against the City and County of San Francisco, the San Francisco Police Department, the police chief, and two police officers under 42 U.S.C. § 1983 alleging a violation of his Fourth Amendment rights during a February 17, 2003 arrest. The district court dismissed the suit against the City and the police chief, but it rejected an assertion of qualified immunity by two of the officers ("Defendants"). Defendants brought an interlocutory

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* The Honorable Cormac J. Carney, United States District Judge for the Central District of California, sitting by designation.

appeal, and we affirm, finding the Defendants not entitled to qualified immunity.

I. FACTUAL & PROCEDURAL BACKGROUND

Rodis is an attorney and an elected public official who sits on the Community College Board of the San Francisco City College. On February 17, 2003, Rodis entered a drugstore near his office to purchase a few items. He tendered to the cashier a $100 bill, and she examined it for authenticity. Because it was an old bill (a 1985 series), and because it appeared to have a texture different than bills with which the cashier was familiar, she asked the store manager for assistance. The manager came to the counter and examined the bill. Suspecting that it might be counterfeit, the manager took the bill to an office in the back of the store to compare it to other $100 bills from the store's safe.

While the manager was examining the bill, Rodis pulled another $100 bill from his wallet and paid the cashier. After determining that the second bill was authentic, the cashier gave Rodis his change, receipt, and items. Rodis then waited for the manager to return with his bill. After comparing Rodis's bill with similar bills, the manager returned to the front of the store and tested the bill with a counterfeit detector pen, which indicated it was authentic. Nevertheless, the manager remained suspicious because of the bill's appearance and texture. The manager told Rodis he thought the bill might be fake and he was going to

call the police so that they could settle the issue. Rodis was frustrated with the delay but remained in the store willingly until the officers arrived.

Sergeant Jeff Barry and officer Barbara Dullea arrived first on the scene. Officers Michelle Liddicoet and James Nguyen arrived soon thereafter. The drugstore's employees conveyed to the officers their suspicions regarding the bill. The manager told Nguyen he had compared the bill to another and was uncertain about the bill's authenticity. The officers also examined the bill themselves. They concluded it was probably counterfeit, but because they were not certain, the officers decided it would be necessary to call the United States Secret Service to get an expert opinion. *Before doing so,* however, they arrested Rodis for violating 18 U.S.C. § 472,[1] which criminalizes the possession and/or use of counterfeit currency, because the officers believed it would be easiest to continue the investigation from the police station. Notably, no effort was made to investigate whether Rodis intended to use an ersatz bill or whether he believed the bill to be counterfeit. Furthermore, the officers

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[1] Section 472 states:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 472.

never asked to see the other $100 bill Rodis had used to complete the purchase, nor did they ask to see the bills the manager stated he had compared with the bill in question.

Liddicoet and Nguyen handcuffed and transported Rodis in the back of a squad car to the police station. Once they arrived, the officers restrained Rodis in a holding area while Nguyen called the Secret Service. Unable to speak with an agent right away, Nguyen left a message requesting assistance, and after twenty to thirty minutes, a Secret Service agent returned the call. Nguyen and the agent discussed the details of the bill in question for five to ten minutes, during which the agent confirmed that the bill was in fact *genuine*. The officers released Rodis from custody, and Nguyen drove him back to the drugstore.

On October 1, 2003, Rodis filed suit against the City and County of San Francisco, then Chief of Police Alex Fagan, Sergeant Barry, and Officer Liddicoet. The complaint alleged false arrest and excessive force in violation of Rodis's Fourth Amendment rights, conspiracy to violate Rodis's rights, injunctive relief, and several state law claims, including false arrest and intentional and negligent infliction of emotional distress.

On February 11, 2005, the defendants moved for summary judgment, and on March 22, 2005, the district court granted the motion as to Rodis's conspiracy, municipal liability, and injunctive relief

claims. The district court denied the motion in all other respects, holding that because the officers lacked evidence regarding Rodis's intent to defraud, probable cause was lacking and the arrest was unlawful. The court also found Barry and Liddicoet not entitled to qualified immunity because the illegality of the arrest was clearly established at the time.

II. DISCUSSION

A. Jurisdiction & Standard of Review

Normally, a district court's interlocutory order denying a motion for summary judgment is not immediately appealable. *Morgan v. Morgensen,* 465 F.3d 1041, 1044 (9th Cir. 2006). There is an exception, however, when a defendant's motion for summary judgment on the basis of qualified immunity is denied. *Gausvik v. Perez,* 345 F.3d 813, 816 (9th Cir. 2003); *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985). Under this exception, we have jurisdiction pursuant to 28 U.S.C. § 1291, *Behrens v. Pelletier,* 516 U.S. 299, 301 (1996), and we review the qualified immunity determination de novo. *Osolinski v. Kane,* 92 F.3d 934, 936 (9th Cir. 1996).

B. Defendants are Not Entitled to Qualified Immunity

Qualified immunity serves as a defense to § 1983 claims against government officers "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982) (citations omitted). To determine whether qualified immunity applies, we engage in a two-part inquiry:

> [W]e first must ask whether a constitutional right would have been violated on the facts alleged. If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. If a constitutional violation is established, we consider whether that right was clearly established such that it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. This inquiry is wholly objective. . . .

Brittain v. Hansen, 451 F.3d 982, 988 (9th Cir. 2006) (internal citations and quotation marks omitted); *see also Saucier v. Katz,* 533 U.S. 194, 202 (2001).

Defendants argue they are entitled to qualified immunity because (1) they did not violate Rodis's constitutional rights, and (2) even if they did not have probable cause to arrest him, at the time of the arrest the law was not clearly established such that a reasonable officer should have known the arrest violated the Fourth Amendment. However, arresting Rodis without *any* evidence he intended to use the bill to defraud the store or that he knew (or believed) the bill was fake was a violation of his Fourth Amendment rights. Further, it was clearly established at the time of the arrest that Defendants' conduct was

unlawful. Thus, both arguments Defendants put forth are without merit.

1. Defendants did *not* have probable cause to arrest Rodis.

Defendants concede they arrested Rodis without evidence he used the bill with the intention to defraud or that he believed the bill to be fake. They also concede the arrest required probable cause as it was more than merely an investigatory stop. To be entitled to qualified immunity, therefore, Defendants must show probable cause existed absent any evidence of Rodis's intent or knowledge. This they cannot do.

Defendants' argument can be summarized in the following manner. First, they cite our decision in *United States v. Thornton,* 710 F.2d 513, 515 (9th Cir. 1983), for the premise that probable cause does not require specific evidence of every element of an offense. Second, they posit that only where "specific intent" is an element of the offense, is evidence of intent required for probable cause, citing our holding in *Easyriders Freedom F.I.G.H.T. v. Hannigan,* 92 F.3d 1486 (9th Cir. 1996). Third, Defendants contend that 18 U.S.C. § 472 is not a specific intent crime, and, therefore, evidence regarding Rodis's intent or knowledge was not required to establish probable cause.

By focusing on the distinction between specific and general intent, Defendants lose sight of the

principal inquiry: whether they had probable cause to effectuate an arrest. Probable cause cannot be determined by applying "precise definition[s]" or rigid classifications of conduct, as Defendants suggest, "because it deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle,* 540 U.S. 366, 371 (2003). Indeed, "probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates,* 462 U.S. 213, 232 (1983). Thus, the specific circumstances surrounding the arrest are an indispensable part of the analysis: "[W]e examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Pringle,* 540 U.S. at 371 (quoting *Ornelas v. United States,* 517 U.S. 690, 696 (1996)).

A review of the record reveals that the circumstances surrounding Rodis's arrest fell *far short* of creating a "fair probability" he had committed *any* crime, much less the crime in question. *See United States v. Rodriquez,* 464 F.3d 1072, 1078 (9th Cir. 2006) ("Probable cause exists when there is a fair probability or substantial chance of criminal activity."). Rodis was arrested on suspicion of violating 18 U.S.C. § 472. It was clear well before Rodis's arrest that "[t]o support a conviction for possession of counterfeit currency with intent to defraud under . . . § 472, the government must prove three elements:

(1) possession of counterfeit money; (2) knowledge, at the time of possession, that the money is counterfeit; and (3) possession with intent to defraud." *United States v. Rodriguez,* 761 F.2d 1339, 1340 (9th Cir. 1985); *see also Albillo-Figueroa v. I.N.S.,* 221 F.3d 1070, 1073 (9th Cir. 2000) (reciting same three required elements); *United States v. McCall,* 592 F.2d 1066, 1068 (9th Cir. 1979) (per curiam) (same). Therefore, to violate § 472, the defendant must not only possess or pass counterfeit money, but he must know the money is counterfeit *and* he must intend to use the money to defraud another.

Notwithstanding the statute's three requirements, Defendants assert they had probable cause to arrest Rodis based solely on evidence suggesting the bill might have been fake. Specifically, they point to the manager's suspicion that the bill was counterfeit, the fact Rodis used the bill to pay for small items, and the officers' own "diligent" and "independent" examination of the bill. Although it is not clear whether this evidence was enough to create the fair probability the bill was fake, even if we assume it was,[2] this evidence speaks to only one of the three elements of the offense; indeed, these facts have no bearing on the

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[2] Our dissenting colleague argues that probable cause existed because "officers are allowed to make reasonable mistakes" and the officers here made a mistake in assuming the bill was counterfeit. Dissent at 10686. Of course, this is irrelevant, for even if the bill was fake, at least *some* evidence of Rodis's alleged intent to defraud would have been required to establish probable cause.

crime's two mens rea components (i.e., knowledge and intent to defraud), which are indispensable in the probable cause calculus. *See Gasho,* 39 F.3d 1420, 1429 (9th Cir. 1994) (opining, in the context of a probable cause inquiry, "[i]t is fundamental that a person is not criminally responsible unless criminal intent accompanies the wrongful act"); *Morissette v. United States,* 342 U.S. 246, 251 (1952) (noting that a crime is the "concurrence of an evil-meaning mind with an evil-doing hand").

Defendants are correct that not every element required for a conviction is necessarily required to establish probable cause. *See Thornton,* 710 F.2d at 515. However, this rule must be applied with an eye to the core probable cause requirement; namely, that "under the totality of the circumstances, a prudent person would have concluded that there was a fair probability that the suspect had committed a crime." *Hart v. Parks,* 450 F.3d 1059, 1066-67 (9th Cir. 2006).[3] The record shows, and Defendants concede, they had no evidence whatsoever demonstrating that Rodis intended to use the bill to defraud the store, nor was there any reason to believe Rodis believed the bill was fake. Of course, the dearth of evidence regarding

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[3] The dissent protests our citation to legal authority identifying what is required for a conviction under § 472 in determining what is required to establish probable cause. Dissent at 10687-88. But surely, identifying the elements of a crime, and evaluating which, if any, are present in a given situation are necessary to determine whether there is a "fair probability" that the crime has been committed.

the mens rea elements is not surprising given that (1) the officers did not even attempt to investigate Rodis's state of mind before arresting him, and (2) the bill was in fact genuine.

What is more, several facts known to the officers at the time of the arrest significantly *decreased* the probability that Rodis violated § 472. Viz., Rodis had other $100 bills in his possession that were genuine, one of which he used to complete the transaction; the counterfeit detector pen indicated the bill was genuine; and the officers knew Rodis was both a San Francisco attorney and a locally-elected public official with strong ties to the community in which the store was located. Specifically, Barry had known Rodis for several years. He knew Rodis was a member of the Community College Board, and he had interacted with Rodis personally, encountering him at activities associated with the elementary school that both Barry's and Rodis's children attended. Also, Rodis informed Liddicoet prior to his arrest that he was a public figure, and that he lived and worked within two blocks of the store. Liddicoet told him she knew who he was and that he "should be ashamed" of himself.

Thus, the officers' knowledge regarding Rodis's identity and background discounted any probability that Rodis might have intentionally passed a fake bill. Defendants argue that this information is irrelevant because police officers do not provide favored treatment based on a person's identity. Rodis was not entitled to special treatment, however, nor did he

request it. Instead, Rodis's strong ties to the local community should have been incorporated into the probable cause determination because *all* the facts known to the officers were relevant. *See United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007) (reiterating that probable cause requires analysis of "the totality of the circumstances").

In any event, even without knowledge of Rodis's identity and local ties, based on the totality of the other relevant facts, no reasonable or prudent officer could have concluded that Rodis intentionally and knowingly used a counterfeit bill, especially when "[t]he key element of section 472 is its mens rea, the specific intent to defraud." *United States v. DeFilippis*, 637 F.2d 1370, 1373 (9th Cir. 1981). Without at least some evidence regarding the knowledge or intent elements of the crime, probable cause is necessarily lacking. To hold otherwise would render any individual vulnerable to arrest who unknowingly, through the normal stream of commerce, comes to possess or use a counterfeit bill, even if other circumstances suggest that a crime has not been committed. This is not and cannot be the law. *See United States v. Lorenzo*, 570 F.2d 294, 299 (9th Cir. 1978) ("The mere passing of a counterfeit bill is not a criminal offense. . . .").[4]

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[4] Defendants' reliance on *Easyriders* is also misplaced. In that case, we opined, "when specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has

(Continued on following page)

2. At the time of Rodis's arrest, it was clearly established that evidence of intent was required to establish probable cause.

Defendants contend that, even if they did not have probable cause to arrest Rodis for the offense,

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occurred." 92 F.3d at 1499 (quoting *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994)). Erroneously, Defendants cite *Easyriders* for the proposition that *only* where an offense is a specific intent crime is evidence of intent required to establish probable cause. Thus, Defendants blatantly misconstrue our holding by confusing a sufficient condition (i.e., *if the underlying offense is a specific intent crime,* evidence of intent must be present prior to an arrest) with a necessary one (i.e., if evidence of intent is required prior to an arrest, *the underlying offense must be a specific intent crime*). Furthermore, Defendants' interpretation runs contrary to the fact-specific nature of a probable cause inquiry. Probable cause does not always require a showing of every element of the crime because it "is a fluid concept – turning on the assessment of probabilities in particular factual contexts. . . ." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Consequently, it is patently unreasonable to say that evidence of a defendant's intent or knowledge is *never* required to establish probable cause for a general intent crime, as Defendants would have us hold.

In any event, Defendants are also incorrect that passing counterfeit currency is a general intent crime. Generally, "[t]o act with the 'intent to defraud' means to act willfully, and with the *specific intent* to deceive or cheat for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself." *United States v. Cloud*, 872 F.2d 846, 852 n.6 (9th Cir. 1989) (emphasis added). Section 472 expressly requires an "intent to defraud." 18 U.S.C. § 472. Thus, under *Easyriders,* proof of Rodis's specific intent to deceive or cheat was required to arrest him. *See also DeFilippis,* 637 F.2d at 1373 (stating that § 472 requires the specific intent to defraud).

the law was not clearly established at the time such that a reasonable officer would have known the arrest was unlawful. They are incorrect.

Requiring the law to be clearly established "is not to say that an official action is protected by qualified immunity unless the *very action in question* has previously been held unlawful, but it is to say that in light of pre-existing law the July 5, 2007 unlawfulness must be apparent." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987) (citation omitted) (emphasis added). This means that the right may be clearly established even when "[t]he reasoning, though not the holding" of a prior court of appeals decision puts the officer on notice. *Hope v. Pelzer,* 536 U.S. 730, 743 (2002). Thus, "officials can still be on notice that their conduct violates established law even in novel factual circumstances" and the facts need not be "materially similar" to the plaintiff's situation. *Id.* at 741. If the law were otherwise, "officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct." *Deorle v. Rutherford,* 272 F.3d 1272, 1286 (9th Cir. 2001).

As heretofore explained, it was well established at the time of Rodis's arrest that "probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Gates,* 462 U.S. at 232. Based on the totality of the circumstances, no prudent officer reasonably could

have concluded there was a fair probability that Rodis violated § 472 or any other offense. "Mere suspicion, common rumor, or even strong reason to suspect are not enough" to establish probable cause, *Easyriders*, 92 F.3d at 1498, and the evidence in this case fell short of creating even a strong reason to suspect. Therefore, the officers were on notice that something more was required.

The only Ninth Circuit authority to which Defendants' point for support is *United States v. Bates* 352 F.2d 399 (9th Cir. 1965) (per curiam), and *United States v. Ford,* 461 F.2d 534 (9th Cir. 1972) (per curiam).[5] These cases do not stand for the proposition Defendants claim – that probable cause to arrest for a violation of § 472 can exist with nothing more than a reason to believe the bill might be fake. In fact, the

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[5] Our dissenting colleague cites three out-of-circuit cases and *United States v. Blum,* 432 F.2d 250 (9th Cir. 1970), contending that evidence of intent is unnecessary to establish probable cause. Dissent at 10688-89. Her contention, however, lacks merit. First, the out-of-circuit cases, even if applicable to the circumstances in this case, are not binding on this panel. Second, *Blum* is easily distinguishable, in that numerous facts – such as the suspect fleeing the scene and the fact the suspect lived outside the state – could have been enough to create a "fair probability" he passed counterfeit bills. In any event, *Blum* is an old case, and since it was decided (nearly forty years ago), we have made clear that (1) "[t]he key element of section 472 is . . . the specific intent to defraud," *DeFilippis,* 637 F.2d at 1373, and (2) "when specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred." *Easyriders,* 92 F.3d at 1499.

opinion in *Ford,* which consists of only two paragraphs, is so lacking in factual background, that what the panel deemed sufficient for probable cause is unknown. The opinion in *Bates* also fails to provide a factual context sufficient to give the decision meaning. The opinion acknowledges that a third party, a tow truck operator at the scene of the arrest, "filled in chinks of circumstances to give probable cause," and that "the circumstances pointing to Bates as a participant in counterfeit transactions . . . certainly pointed an accusing finger at him – enough for probable cause." 352 F.2d at 400. However, there is no explanation of what any of those circumstances were.

Thus, in both *Ford* and *Bates* we are left to our own devices to determine what the relevant facts could have been in establishing probable cause. Consequently, neither case supports a finding of probable cause in the instant case.

III. CONCLUSION

Probable cause requires "information sufficient to warrant a prudent person in believing that the accused had committed or was committing an offense." *Allen v. City of Portland,* 73 F.3d 232, 237 (9th Cir. 1996). Given all of the circumstances surrounding Rodis's arrest, no prudent person could have concluded reasonably that there was a fair probability Rodis had committed a crime. Consequently, Defendants are not entitled to qualified immunity.

AFFIRMED.

CALLAHAN, Circuit Judge, dissenting:

I respectfully dissent.

What happened to Mr. Rodis was unfortunate, and certainly could have been handled in a different manner. Arresting him due to a failure to recognize an older series 100 dollar bill, however, was not an intentional violation of Mr. Rodis's constitutional rights, nor was the law that probable cause for arresting someone on suspicion of violating 18 U.S.C. § 472 requires proof of the suspect's subjective intent clearly established. Therefore, the officers are entitled to qualified immunity. In fact, prior case law established that in order to have probable cause to arrest someone for a suspected violation of 18 U.S.C. § 472, an officer simply had to have evidence that 1) someone attempted to pass a false note, and 2) the identity of the person suspected of passing the note. *See United States v. Everett,* 719 F.2d 1119, 1120 (11th Cir. 1983) (collecting cases).

I. The officers did not violate Mr. Rodis's constitutional rights.

Our analysis should begin with the basic principles of qualified immunity. "Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz,* 533 U.S. 194, 200 (2001) (quoting *Mitchell,* 472 U.S. 511, 526 (1985)). "The privilege is 'an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously

permitted to go to trial.'" *Id.* at 200-01 (quoting *Mitchell v. Forsyth,* 472 U.S. at 526). "[I]t is fundamental that in a defense of qualified immunity in order to have the public official relieved from time-consuming pre-trial procedures and trial itself, it is important to resolve this issue at an early stage of the litigation." *Cunningham v. City of Wenatchee,* 345 F.3d 802, 808 (9th Cir. 2003).

"A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts show the officer's conduct violated a constitutional right?" *Saucier,* 533 U.S. at 201. The reason for this initial inquiry is to state principles that "will become the basis for holding that a right is clearly established" to advance the interpretation of the law. *Id.* "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity."[1] *Id.*

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[1] The majority's opinion appears to begin its analysis by deciding that the right to avoid arrest if there is no evidence of specific intent is clearly established without first finding a constitutional violation. (Maj. Op. at 10678.) The Supreme Court specifically rejected this approach in *Saucier v. Katz,* 533 U.S. at 200.

A. Officers are allowed to make reasonable mistakes of fact without violating constitutional rights.

Mr. Rodis contends that the officers violated his Fourth Amendment rights by arresting him without probable cause to believe that he possessed the intent to defraud, one of the elements of a violation of 18 U.S.C. § 472. "Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution." *Saucier,* 533 U.S. at 205. "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Baker v. McCollan,* 443 U.S. 137, 146 (1979).

In this case, the officers made a simple mistake – they mistook a genuine 1985 series 100 dollar bill for a fake because the clerk who received the bill from Mr. Rodis, the manager who examined the bill, and the officers who responded to the scene had never seen a pre-1991 100 dollar bill before.[2] The bill Mr. Rodis presented lacked the security thread, watermarks, microprinting, and other anticounterfeiting features of current 100 dollar bills.[3] The fact that

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[2] The district court noted that Officer Liddicoet testified that the bill looked real to her. However, a review of the record shows that Liddicoet testified that the bill did not look real.

[3] The Treasury introduced security thread and microprinting in $50 and $100 bills in 1990 to deter counterfeiting. *See*

(Continued on following page)

there is another branch of government, the Department of the Treasury, that has agents specifically trained and tasked with detecting counterfeit bills shows that the average street-level officer is not held to have infallible counterfeit detection skills. The fact that a clerk, and the manager both continued to think that the bill was counterfeit indicates that the officers' mistake was objectively reasonable. That we have a different view of the evidence should not change our analysis. *See Hunter v. Bryant,* 502 U.S. 224, 226-27 (1991) (reversing the Ninth Circuit's refusal to grant qualified immunity because officials are entitled to an accommodation for reasonable error as a matter of law). Although qualified immunity does not protect "the plainly incompetent," in this case the failure of the officers to recognize an outdated bill lacking modern security features was not plainly incompetent, but rather an unfortunate mistake that any reasonable officer could have made. *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

Federal Reserve Bank of San Francisco, http://www.frbsf.org/federalreserve/money/funfacts.html (last accessed August 9, 2007). The Treasury also redesigned and added new security features to the $100 bill in 1996. *Id.*

B. The majority improperly uses the standards for conviction in creating a new standard for probable cause to arrest under 18 U.S.C. § 472.

Assuming the mistake of fact does not completely dispose of Mr. Rodis's claim, the majority opinion improperly imposes the government's burden of proof at trial on the probable cause inquiry. "Probable cause must be evaluated from the viewpoint of prudent and cautious police officers on the scene at the time of arrest." *Long v. United States,* 422 F.2d 1024, 1026 (9th Cir. 1970). "The issue is whether police officers, acting together, in particular circumstances, all conditioned by their observations and information and guided by their total police experience, reasonably could have believed that a crime had been committed by the person to be arrested." *Id.* Our court has acknowledged time and time again that "[p]robable cause exists when there is a fair probability or substantial chance of criminal activity." *United States v. Rodriquez,* 464 F.3d 1072, 1078 (9th Cir. 2006) (quoting *United States v. Soriano,* 361 F.3d 494, 505 (9th Cir. 2004)). The Supreme Court has long held that "[p]robable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction." *Adams v. Williams,* 407 U.S. 143, 149 (1972); *see also Draper v. United States,* 358 U.S. 307, 311-12 (1959).

Yet the majority does precisely that by stating that "[i]t was clear well before Rodis's arrest that '[t]o support a *conviction* for possession of counterfeit

currency with intent to defraud under . . . § 472, the government must prove three elements: (1) possession of counterfeit money; (2) knowledge, at the time of possession, that the money is counterfeit; and (3) possession with intent to defraud.'" (emphasis added) (Maj. Op. at 10678) (quoting *United States v. Rodriguez,* 761 F.2d 1339, 1340 (9th Cir. 1985)). The majority cites over and over cases concerning what must be proven at trial to sustain a conviction under 18 U.S.C. § 472, not cases specifically stating what is required for probable cause to believe that a person has attempted to pass a counterfeit note with intent to defraud. (Maj. Op. at 10678, 10679-80.) The government's burden at trial is not the same as the standard for probable cause. Conflating the two and imposing a new requirement that officers must have conclusive evidence of specific intent in order to have probable cause to arrest violates the basic principles of qualified immunity in arrest cases.

C. Under existing law, the officers had probable cause to arrest Mr. Rodis on suspicion that he violated 18 U.S.C. § 472; therefore they did not violate his constitutional rights.

So what was the proper inquiry for analyzing whether the officers had probable cause to arrest Mr. Rodis? In *Everett,* 719 F.2d at 1120, the Eleventh Circuit held that, "[t]he passing of a counterfeit note coupled with an identification of the person who passed the note furnishes probable cause to arrest the

individual identified as passing the note." "Generally, probable cause to arrest for the offense of passing a counterfeit note is established by circumstances showing the passing of a counterfeit note coupled with an identification of the individual who passed the note." *United States v. Hernandez,* 825 F.2d 846, 849 (5th Cir. 1987). In *United States v. Blum,* 432 F.2d 250, 251-53 (9th Cir. 1970), we upheld a finding of probable cause based on a merchant's report that he received bills he believed were counterfeit, and the officer's examination of the bills. The arrest in that case was based solely on the report of the service station owner, his description of the suspect and the suspect's car, and the officer's examination of the bill and determination that it was a counterfeit bill. *Id.* at 251-52. A bulletin was broadcast on the radio, and an officer arrested the defendant without a warrant a short time later. *Id.* at 252. After discussing the probable cause standard at length, this court affirmed the denial of a motion to suppress, stating "we conclude that on the basis of the facts and circumstances known to the police officers involved, or as to which they had reasonably trustworthy information, that probable cause existed for Blum's arrest." *Id.* at 253.

Nothing in our case law undermines the premise of *Blum,* or the Fifth and Eleventh Circuit's determination that probable cause that a person violated 18 U.S.C. § 472 is satisfied upon the attempted passing of an apparently counterfeit note and the identification of the person who tried to pass the note. *See also United States v. Allison,* 616 F.2d 779, 782 (5th Cir.

1980) (concluding that officer's lack of firsthand knowledge concerning defendant's intent to defraud does not eliminate probable cause created by reliable information that possessor attempted to pass bill as genuine); *United States v. McCoy,* 517 F.2d 41, 43 n.1 (7th Cir. 1975) ("[T]he record clearly shows that the arresting officer had knowledge of facts – namely, that McCoy had attempted to acquire merchandise in exchange for a counterfeit bill – which established probable cause to believe that appellant had violated § 943.38 of the Wisconsin Criminal Code (Forgery)."). Because "[i]ntent and knowledge may be inferred from [a suspect's] overall actions," the officers had probable cause to arrest him, and did not have to have probable cause of Mr. Rodis's specific intent to defraud. *United States v. Lorenzo,* 570 F.2d 294, 299 (9th Cir. 1978). An attempt to pass a counterfeit bill, even if the bill is recognized and rejected, is sufficient to sustain the intent element for the purposes of a conviction. *See id.* at 295-96, 299 (noting waitress rejected counterfeit bill, but sustaining conviction); *see also United States v. McCall,* 592 F.2d 1066, 1068 (9th Cir. 1979) (affirming conviction where the defendant told inconsistent stories about the source of the counterfeit bills, even though the manager detected the counterfeit bill and called police immediately). Even the case cited by the majority, *United States v. DeFilippis,* 637 F.2d 1370, 1373 (9th Cir. 1981), declined to impose any additional elements, or to raise the burden of proof to sustain a conviction under 18 U.S.C. § 472. Based on well-established principles concerning probable cause, and case law

specifically holding that officers have probable cause to arrest someone on suspicion of having violated 18 U.S.C. § 472 if there is evidence of the passing of an allegedly counterfeit note and the identification of a suspect, I would conclude that the officers did not violate Mr. Rodis's constitutional right to be free from arrest absent probable cause.

Applying the majority's newly announced standard will also result in absurd results. If a suspect simply says that he does not know if the bill is real or fake, or if he carries around a real bill and offers to substitute it for the counterfeit one, officers may not arrest him to investigate the probable unlawful conduct. In the case of a clever criminal who is skilled at lying, officers would be powerless to arrest the suspect even when he attempts to pass a clearly counterfeit bill, if the suspect verbally disavows knowledge or intent and pays with a legitimate bill. A criminal could test the counterfeit detection skills of clerks, bartenders, and other consumers at will without fear of arrest.

Imposing a requirement that asks officers to read criminals' minds to discern their subjective knowledge and intent is not practical or grounded in reality. Intent to defraud is often established through evidence concerning knowledge such as additional counterfeit bills, reproduction equipment, plates, ledgers, and other evidence that officers would no longer be able to gather incident to arrest or through a search warrant. For example, if the bill in this case happened to be counterfeit, further investigation

would have established that Mr. Rodis genuinely lacked the specific intent to defraud, making him a victim of counterfeiting. Detectives, or more likely Secret Service agents, would then investigate to determine the origin of the bill, and hopefully arrest the counterfeiters.

In this particular case, however, the officers made the reasonable mistake of failing to recognize a genuine pre-1991 100 dollar bill. The majority uses this mistake to impose a new, higher standard for probable cause based on the elements necessary to sustain a conviction, instead of concentrating on whether it is more probable than not that a crime occurred under these circumstances. (Maj. Op. at 10678, 10679-80.) I would follow our prior decision in *Blum,* as well as the rulings in other circuits establishing the standard for probable cause for violations of 18 U.S.C. § 472 and conclude that the officers did not violate Mr. Rodis's Fourth Amendment rights because they had sufficient probable cause for the arrest.

D. There is no constitutional requirement that an officer fully investigate a suspect's defenses, including his lack of the required mental state, before arrest.

As an additional justification for concluding that the officers did not have probable cause, the majority faults the officers' investigation under the circumstances, arguing that certain facts reduced the probability that Rodis had the specific intent necessary to

secure a conviction. (Maj. Op. at 10679-80.) This argument concerning inadequate investigation of the intent element is foreclosed by *Baker v. McCollan,* where the Supreme Court granted qualified immunity after the arrest and detention of a suspect in a case involving mistaken identity. "[I]nnocence of the charge . . . is largely irrelevant to [a] claim of deprivation of liberty without due process of law." *Baker,* 443 U.S. at 145. "The Constitution does not guarantee that only the guilty will be arrested." *Id.* An arresting officer is not "required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity *or a defense such as lack of requisite intent.*" (emphasis added) *Id.* at 145-46. "Nor is the official charged . . . to perform an error-free investigation of such a claim." *Id.* at 146. "The ultimate determination of such claims of innocence is placed in the hands of the judge and jury." *Id.*

Consistent with *Baker,* the officers were allowed to arrest Mr. Rodis because they had objective evidence that Mr. Rodis attempted to pass the note, and Mr. Rodis did not contest the clerk and the manager's statements that he attempted to pay for goods with the suspicious note even though the clerk, the manager, and the officers were mistaken and the note turned out to be genuine. After further investigation, the officers discovered their mistake and released Mr. Rodis. The officers were not constitutionally required to conduct an exhaustive investigation into Mr. Rodis's state of mind before making an arrest. *See id.*

at 145-46; *see also Marks v. Carmody,* 234 F.3d 1006, 1009-10 (7th Cir. 2000) (concluding officers acted reasonably in arresting even though suspect presented evidence tending to show that he lacked the intent to defraud); *United States v. Bertram,* 719 F.2d 735, 737-38 (5th Cir. 1983) (rejecting defendant's argument that officers lacked probable cause to arrest because the counterfeit Krugerrands had the word "copy" on them, making it impossible for him to defraud anyone). Nor was the officers' mistake of fact a violation of Mr. Rodis's constitutional rights. Therefore, I would hold that the officers were entitled to qualified immunity because they did not violate Mr. Rodis's Fourth Amendment rights.

II. The majority's opinion announces a new principle that officers must have specific evidence of intent to defraud in order to have probable cause to arrest; therefore, the law was not clearly established and the officers were entitled to qualified immunity.

This is precisely a case where "an official could not reasonably be expected to anticipate subsequent legal developments." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). As noted above, the case law in this and other circuits, prior to today's holding, uniformly stated that the standard for probable cause to arrest on suspicion of violating 18 U.S.C. § 472 required only 1) an attempt to pass an allegedly counterfeit note, and 2) an identification of the person who

attempted to pass the note. *See Blum,* 432 F.2d at 251-53; *Everett,* 719 F.2d at 1120; *United States v. Sheppard,* 455 F.2d 1081, 1083 (10th Cir. 1972); *see also United States v. Ford,* 461 F.2d 534 (9th Cir. 1972) (per curiam) (noting attempt to pass counterfeit money, a description of the suspect by a storekeeper, and the key exhibit falling out of the suspect's pocket as supporting probable cause); *Bates v. United States,* 352 F.2d 399, 399-400 (9th Cir. 1965) (per curiam) (discussing identification of suspect). Our own cases involving other statutes that require intent to defraud do not require officers to accept a suspect's version of events or to determine whether he actually had that intent. *See United States v. Mayo,* 394 F.3d 1271, 1276 (9th Cir. 2005) (affirming a finding of probable cause to arrest for "placing a stolen registration sticker on a license plate, with intent to defraud" where there was "no dispute that Mayo admitted that he was driving the car that day, was in the process of buying it, and had been in possession of it for the last month"); *United States v. Thomas,* 835 F.2d 219, 222 (9th Cir. 1987) (discussing act and identity).[9] The Eleventh Circuit recently reiterated in a § 1983 false arrest case that "even for a criminal statute that requires proof of an intent to defraud for a conviction,

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[9] The majority cites two cases, *Easyriders Freedom F.I.G.H.T. v. Hannigan,* 92 F.3d 1486, 1499 (9th Cir. 1996) and *Gasho v. United States,* 39 F.3d 1420, 1429 (9th Cir. 1994) where the specific intent required was a form of specialized knowledge. For intent to defraud cases, the specific intent is usually inferred from the act itself.

an arresting officer does not need evidence of the intent for probable cause to arrest to exist." *Jordan v. Mosley,* 487 F.3d 1350, 1356 (11th Cir. 2007).

In essence, the specific intent to defraud is inferred from the attempted passing of the bill. It is the rare case that a person intending to defraud will admit it. The case law discussed above concerning the lack of a duty to investigate a suspect's proffered defense of a lack of intent exists precisely because almost every suspect – innocent or not, will profess a lack of intent. The majority's additional requirement that the officer have some conclusive level of evidence of intent to defraud is inconsistent with these precedents.

The majority cites to no case specifically requiring that officers have explicit evidence of a suspect's subjective intent to defraud before they have probable cause to arrest on suspicion of violating 18 U.S.C. § 472. This lack of precedent to support the majority's approach is telling, and I cannot find that an officer must have conclusive evidence of intent to defraud before arresting a suspect was clearly established. In my view, the case law allowing officers to infer the intent to defraud from the attempted passing of the counterfeit note is sufficient to establish probable cause was the clearly established law prior to this decision. We cannot expect the officers to anticipate the majority's ruling that they should have had explicit and conclusive evidence of the suspect's subjective intent to defraud prior to arrest, because it is found nowhere else in any federal court's jurisprudence

concerning probable cause to arrest under 18 U.S.C. § 472. Therefore, I cannot join in the majority's conclusion that such a requirement was clearly established prior to today, and I would grant the officers qualified immunity.

What happened to Mr. Rodis was an unfortunate mistake. We cannot allow bad facts to make bad law. Simple and reasonable mistakes of fact are not constitutional violations, however, nor should a mistake subject the officers to a lawsuit under 42 U.S.C. § 1983. The case law simply does not support the majority's view that probable cause to arrest under 18 U.S.C. § 472 requires specific and conclusive evidence of a suspect's subjective intent to defraud. The majority's error is compounded by the fact that it fails to recognize that it is adding a wholly new requirement to the probable cause inquiry that has no support anywhere in federal statutory or case law, and therefore cannot be clearly established. I would vacate the district court's order and remand with instructions to grant the officers qualified immunity from suit and grant their motion for summary judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RODEL E. RODIS,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants /

No. 04-0314 MMC

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; VACATING HEARING

(Docket No. 38)

Before the Court is the motion of defendants City and County of San Francisco ("the City"), former San Francisco Police Chief Alex Fagan ("Fagan"), San Francisco Police Officer Michelle Liddicoet ("Liddicoet"), and San Francisco Police Sergeant Jeff Barry ("Barry") for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff Rodel Rodis ("Rodis") has filed opposition, to which defendants have replied. Having considered the papers filed in support of and in opposition to the motion, the Court deems the matter appropriate for decision on the papers, VACATES the hearing scheduled for March 18, 2005, and rules as follows.

BACKGROUND

Rodis is an "elected official of [the] San Francisco Community College Board, a lawyer in private practice, and an active member of the Filipino American community." (*See* Compl. ¶ 2.) Rodis alleges that on

February 17, 2003, he was "without probable cause, detained, handcuffed, and transported to the police station on the pretext he was suspected of using a counterfeit one hundred dollar bill to purchase goods from a Walgreens." (*See* Compl. ¶ 16.) Based on these allegations, Rodis alleges six causes of action, specifically, a claim under 42 U.S.C. § 1983 (First Cause of Action,), a claim of conspiracy to deprive him of his civil rights (Second Cause of Action), a claim for a mandatory injunction (Third Cause of Action), a claim of false arrest (Fourth Cause of Action), a claim of negligent infliction of emotional distress (Fifth Cause of Action), and a claim of intentional infliction of emotional distress (Sixth Cause of Action).

DISCUSSION

Rodis's claims are based on two theories. First, Rodis alleges he was subjected to an unreasonable seizure when he was placed in handcuffs, arrested without probable cause, and then detained at a police station until such time as the officers learned, from contacting the Secret Service, that the bill he attempted to use at Walgreens' was not counterfeit. Second, Rodis alleges defendants' actions were taken on account of racial animus.

I. Damages Claims Against Liddicoet and Barry

A. Federal Claims

Defendants argue that Liddicoet, one of the arresting officers, and Barry, the ranking officer at the scene of the arrest, are entitled to summary judgment because they did not violate any of Rodis's rights or, alternatively, if they did, they are entitled to qualified immunity.[1]

1. Reasonableness of Seizure

Defendants argue that, based on statements made to the officers by Walgreens employees that they suspected the bill presented by Rodis might be counterfeit,[2] and the observations of officers at the

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[1] Although Liddicoet and Barry played different roles in the arrest, defendants do not differentiate between the actions of these two defendants.

[2] At Liddicoet's deposition, she answered "yes," in response to the question, "Were you informed that Walgreens suspected the bill was counterfeit?" (*See* Wiener Decl. Ex. C at 42.) Denis Snopikov, Walgreens' assistant manager, testified he informed the officers he had used a "counterfeit pen" on Rodis's bill and that Rodis's bill "passe[d] the test," but he was "confused" and "suspected" the bill to be counterfeit because he had also compared Rodis's bill to a "newer version of the $100 bill" and saw that Rodis's bill did not have the same "watermarks or protective thing" as the newer bill. (*See id.* Ex. A at 46-47.)

scene,[3] defendants had probable cause to arrest Rodis for violation of 18 U.S.G. § 472.[4]

Section 472 provides that "[w]hoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeit, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both." *See* 18 U.S.C. § 472. Defendants argue they had probable cause to believe Rodis violated § 472 because it is undisputed they had probable cause to believe "Rodis had attempted to pass a bill that appeared to be fake." (*See* Defs.' Mot. for Summ. J. at 12:4.)[5] Defendants, however, do not argue, at least for the purposes of the instant motion, they had probable cause

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[3] At Liddicoet's deposition, she answered "yes," in response to the question, "Did it [the bill] look real to you?" (*See* Wiener Decl. Ex. H at 63.) Barry testified that, although he did not handle the bill and was somewhere between 10 and 50 feet away from the officers handling the bill, he formed the "impression that it seemed bogus" because the bill "seemed very light and like maybe not like the paper they use for currency." (*See, id.* Ex. E at 54, 57.) Another officer at the scene, Barbara Dullea Officer Dullea"), testified that the "bill's color and texture appeared odd." (*See* Dullea Decl. ¶ 3.)

[4] Defendants do not argue the seizure in question constituted an investigatory stop.

[5] In light of the Court's holding, discussed *infra*, the Court does not address the issue of whether the officers had probable cause to believe the bill was counterfeit.

to believe plaintiff had an intent to defraud. Defendants acknowledge that "when specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred," *see Easyriders Freedom F.I.G.H.T. v. Hannigan,* 92 F. 3d 1486, 1499 (9th Cir. 1996), but argue that specific intent is not a required element of § 472. Defendants further argue that, in the event this Court finds that specific intent is a required element, such a finding would constitute "new law" rather than "clearly established law," thus entitling Liddicoet and Barry to qualified immunity. *See, e.g., Robinson v. Solano County,* 278 F. 3d 1007, 1015 (9th Cir. 2002) (holding defendants, who violated Fourth Amendment by "pointing a gun to the head of an apparently unarmed suspect," were entitled to qualified immunity because "contours of that right were not at all clear in [the year of the incident]").

The Ninth Circuit has held, in an opinion issued almost twenty years before Rodis's arrest, that "[t]he key element of section 472 is its mens rea, the specific intent to defraud." *See United States v. DeFilippis,* 637 F. 2d 1370, 1373 (9th Cir. 1981) (affirming conviction for violation of § 472 where evidence supported jury's finding defendant passed bill she knew to be counterfeit "with an intent to deceive").

Defendants, nevertheless, rely on cases that, in defendants' view, hold that probable cause to arrest for a violation of § 472 exists even though the officers only have probable cause to believe the suspect has

used a counterfeit bill. The Court initially notes that none of the gases cited by defendants includes a specific holding to such effect. Moreover, the cases cannot be read to support defendants' position. In some instances, the nature of the facts found sufficient to support probable cause are unknown. *See, e.g., Bates v. United States,* 352 F. 2d 399, 400 (9th Cir. 1965) (referring to "tow truck operator at the scene who filled in chunks of circumstance to give probable cause," but not selling forth such circumstance). Others refer to information known to the arresting officer that supports a finding of probable cause as to the element of specific intent to defraud. *See, e.g., United States v. Covelli,* 738 F. 2d 847, 853-54 (7th Cir. 1984) (stating officer, having been advised by store clerk that defendant had passed bill that looked counterfeit, "asked to talk to [the defendant] about something," and that defendant "immediately responded, 'What's wrong? Was the money bad?,' even though the officer had not mentioned money"); *see also United States v. McCall,* 924 F. 2d 1066, 1068 (9th Cir. 1979) (holding jury's finding as to § 472's "intent to defraud" element supported by evidence of defendant's statements exhibiting "consciousness of guilt").[6]

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[6] The sole case arguably supporting defendants' position is *Holt v. United States,* 404 F. 2d 914 (10th Cir. 1968). In *Holt*, the Tenth Circuit stated that because "the mere possession" of counterfeit money is a felony, "if the arresting agent had probable cause to believe such felony was being perpetrated, the arrest was proper." *See id.* at 917-18. The Tenth Circuit, however, cited

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Additionally, defendants cite several cases for the proposition that specific intent is not a required element of § 472. *See, e.g., United States v. Pitts,* 508 F. 2d 1237, 1240 (8th Cir. 1975) (holding, to establish violation of § 472, prosecution must prove defendant possessed counterfeit bills, that defendant knew bills were counterfeit, and that defendant "had a general intent to defraud unknown persons with those bills"). The precise holding of such cases, however, is that it is unnecessary to prove that the defendant intended to defraud a specific person, not that no intent to defraud need be proved. *See Riggs v. United States,* 280 F. 2d 750, 752 (5th Cir. 1960) (discussing indictment in which "'intent to defraud' under Section 472 is charged generally"; holding "'intent to defraud' required by 18 U.S.C. § 472 when, as here, such intent is not restricted by the terms of the indictment or by a bill of particulars to any specified person, may be an 'intent to defraud' unknown third persons").

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no authority providing that "mere possession" is unlawful. Further, the opinion refers to evidence known to the arresting officers that would appear to support a finding of probable cause as to specific intent. *See id.* at 916 (stating agents, who had been advised by "reliable" informant that defendant had agreed to sell informant "counterfeit money," found defendant with counterfeit money at place described by informant). In any event, the opinion, if interpreted as holding a person may be convicted of "mere possession" of a counterfeit bill, is contrary to Ninth Circuit authority holding that "[t]he mere passing of a counterfeit bill is not a criminal offense." *See United States v. Lorenzo,* 570 F. 2d 294, 299 (9th Cir. 1978).

In short, specific intent to defraud is a required element of § 472, and the law was clearly established in the Ninth Circuit well before February 2003. Consequently, it was clearly established before February 2003 that defendants, in order to validly arrest Rodis for violation of § 472, were required to have probable cause to believe Rodis had an intent to defraud. Because defendants do not argue that, in arresting Rodis, they had probable cause to believe Rodis had the specific intent to defraud, defendants have failed to show that the seizure was reasonable. Consequently, defendants have failed to demonstrate that no triable issue of fact exists as to the reasonableness of the seizure.[7]

Similarly, defendants have failed to demonstrate Liddicoet and Barry are entitled to qualified immunity. As noted, at the time of the events in question, the law requiring probable cause as to specific intent was well-established, as was the law making specific intent to defraud an element of § 472. *See Easyriders Freedom F.I.G.H.T.,* 92 F. 3d at 1499; *DeFilippis,* 637 F. 2d at 1373. Consequently, defendants' argument that to require probable cause as to the specific intent

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[7] Because defendants have failed to establish, for purposes of summary judgment, that they had probable cause to arrest Rodis, defendants' argument that it was reasonable to place Rodis in handcuffs, to transport him to a police station, and to restrain him at the station in handcuffs likewise fails. *Cf. Frazier v. City of Philadelphia,* 927 F. Supp. 2d 881, 886-87 (E.D. Pa. 1996) ("Certainly arrest is one of the circumstances justifying the use of handcuffs.").

to defraud would be to create "new law," (*see* Defs.' Mot. for Summ. J. at 15:1, 6), is of no avail.

Accordingly, defendants have not shown Liddicoet and Barry are entitled to summary judgment on Rodis's federal claims for damages to the extent such claims are predicated on the unreasonableness of the seizure.

2. Equal Protection Claim

As noted, Rodis alleges he was subjected to an unreasonable seizure on account of his race. To establish an equal protection deprivation claim, a plaintiff must offer evidence that the defendant "acted in a discriminatory manner and that the discrimination was intentional." *See Bingham v. City of Manhattan Beach,* 341 F. 3d 939, 948 (9th Cir. 2003) (internal quotation and citation omitted).

Rodis argues that because defendants have not proffered a "reasonable explanation" for their decision to "place a publicly elected Filipino city official under arrest," a trier of fact could conclude that defendants took such action on account of Rodis's race. (*See* Pl.'s Opp. at 8:20-9:4.) In essence, plaintiff argues that evidence of his unreasonable seizure coupled with evidence that he is Filipino suffices to establish a prima facie case of racial discrimination. However, as the Ninth Circuit explained in *Bingham,* a case involving an African-American driver stopped by a white officer, evidence that "[the plaintiff] is African-American, the officer is white, and they disagree

about the reasonableness of the traffic stop" is insufficient to support an equal protection claim. *See Bingham,* 341 F. 3d at 948-49.[8]

Moreover, to the extent evidence of animus has been introduced, such evidence does not support a finding of animus on the basis of race. Rather, the evidence, arguably, supports a finding that Barry held negative feelings about Rodis based on reasons having nothing to do with race. Specifically, the evidence, construed in the light most favorable to Rodis, is that, several years prior to the arrest at issue, Barry had a conversation with Rodis during which Barry expressed his disagreement with the Community College Board's policy prohibiting its police officers from carrying firearms and his opinion that Rodis's family was not sufficiently supportive of the athletic department at their children's school.[9] (*See* Weiner Dec. Ex. E at 35-40; Fasano Decl. Ex. 1 at 26-28.)

Accordingly, defendants have shown that Liddicoet and Barry are entitled to summary judgment on Rodis's federal claims to the extent such claims are predicated on a deprivation of equal protection.

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[8] Rodis does not offer evidence as to the race of Liddicoet or Barry.

[9] Barry testified that he was the "athletic director" for the school. (*See* Wiener Decl. Ex. E at 36.)

B. State Law Claims

Rodis's state law claims, as pleaded, are derivative of his federal law claims. (*See* Compl. ¶¶ 30-31, 35-36, 39-40.) Defendants argue that Liddicoet and Barry are entitled to summary judgment on such claims, on the ground Rodis cannot demonstrate he was subjected to an unreasonable seizure and was arrested on account of his race.

For the reasons stated above, defendants have failed to show that Liddicoet and Barry are entitled to summary judgment on the state law claims, to the extent such claims are predicated on the unreasonableness of the seizure, and are entitled to summary judgment on the state law claims, to the extent such claims are predicated on a deprivation of equal protection.

II. Damages Claims Against the City and Fagan

A. Federal Claims

Rodis alleges that the City and Fagan, in his official capacity, are liable under 42 U.S.C. § 1983 for the deprivation of Rodis's federal rights, on the ground such deprivation occurred pursuant to an official City policy or custom, specifically, a lack of training.

A local government entity can be held liable under 42 U.S.C. § 1983 for actions that result in the deprivation of a plaintiffs federal constitutional

rights. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978). The government entity, however, cannot be held liable under § 1983 on a respondeat superior theory. *See id.* at 691. Rather, the plaintiff must show that the employee's unconstitutional activity was "undertaken pursuant to official policy or custom." *See Hopper v. City of Pasco,* 241 F. 3d 1067, 1082 (9th Cir.) (citing *Monell,* 435 U.S. at 690-91), *cert. denied,* 122 S. Ct. 346 (2001).

A municipality's failure to train police officers can constitute a "policy" for *Monell* purposes where "the failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants." *See City of Canton v. Harris,* 489 U.S. 378, 389, 390 n.10 (1989) (observing that because "city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons," a city's failure to train officers on the use of deadly force in such situations "could properly be characterized as 'deliberate indifference' to constitutional rights"). Where, however, a plaintiff bases a *Monell* claim on the theory that the training provided on a specific subject is insufficient, as opposed to totally lacking, the plaintiff cannot prevail unless the plaintiff offers evidence that the insufficiency was the "result of a 'deliberate' or 'conscious' choice" by the municipality. *See Alexander v. City and County of San Francisco,* 29 F. 3d 1355, 1367 (9th Cir. 1994) (quoting *Canton,* 489 U.S. at 389). In other words, the plaintiff must offer evidence to show the municipality "knew it was creating an unjustifiable risk to its

citizenry and ignoring that risk." *See Mateyko v. Felix*, 924 F. 2d 824, 826 (9th Cir. 1990), *cert. denied*, 504 U.S. 814 (1991).

Here, defendants argue Rodis lacks evidence that any unreasonable seizure was taken pursuant to an official policy or custom. Specifically, defendants rely on evidence that the San Francisco Police Department ("SFPD") "periodically issues training updates" in the form of "Roll Call Training Lessons," and that the SFPD has a policy that Roll Call Training Lessons are distributed to all officers, who are then required to read them. (*See* Osborne Decl. ¶¶ 3-4.) Defendants also rely on evidence that, in May 2001, the SFPD issued a Roll Call Training Lesson ("2001 Lesson") regarding "counterfeit currency issues confronting law enforcement," and that such Lesson was distributed to all officers, who, pursuant to official policy, were required to read it. (*See id.* ¶¶ 6.) The 2001 Lesson included a "scenario" in which an officer was called to a store on a complaint of counterfeit currency; additionally, the 2001 Letter set forth a list of "critical issues" an officer might confront in such situation, identified potentially applicable state statutes, and concluded with practice exercises. (*See id.* Ex. A) Defendants further rely on evidence that Officer Dullea, who was present at Walgreens' during Rodis's arrest, recalls seeing written material at the police station stating, in Dullea's words, "what to look for regarding counterfeit currency," (*see* Dullea Decl. ¶ 5), and that Barry also recalls a "bulletin or some sort of training" on counterfeit currency being distributed

around the police station, (*see* Wiener Decl. Ex. E at 19-20).

Rodis argues the 2001 Lesson was deficient in that it did not refer to the element of specific intent to defraud, did not refer to a specific procedure to be followed in all counterfeit bill investigations, and only referred to state statutes. As defendants point out in their reply, however, the 2001 Lesson did refer to the state law requirement that a person possessing a counterfeit bill act with the "intent to utter or pass [the counterfeit bill] as real currency," and did include a list of "issues" that an investigating officer might confront, *e.g.*, that "[a]ny bill printed prior to 1965 will indicate as counterfeit" if tested using a counterfeit pen. (*See* Osborne Decl. Ex. A.) In any event, evidence that the 2001 Lesson could have been more specific or written in a more straightforward manner is insufficient to support a finding that the City or Fagan deliberately or consciously chose to distribute inadequate training material. *See Alexander*, 29 F. 3d at 1367.

Rodis also relies on Liddicoet's testimony that she did not receive training as to counterfeit currency. (*See* Wiener Decl. Ex. C at 17.) Although such evidence might support a finding that the City's policy requiring all officers to read Roll Call Training Lessons is not fool-proof and, indeed, that such policy failed as to Liddicoet, such evidence likewise does not support a finding that the City or Fagan deliberately and consciously chose not to train Liddicoet. *See Alexander*, 29 F. 3d at 1367 (holding evidence that one

officer had not been adequately trained as to proper procedure for arresting suspect at his home "can only be classified as negligence on the part of the municipal defendant").

Lastly, in light of the Court's finding that Rodis lacks sufficient evidence to raise a triable issue as to whether Liddicoet or Barry violated § 1983 by depriving Rodis of equal protection, Rodis cannot establish a § 1983 claim against the City or Fagan predicated on an equal protection violation. *See Orin v. Barclay*, 272 F. 3d 1207, 1217 (9th Cir. 2001) (holding civil rights claim against city "fails as a matter of law" if city employee did not deprive plaintiff of his civil rights), *cert. denied*, 536 U.S. 958 (2002).

Accordingly, defendants are entitled to summary judgment as to Rodis's federal damages claims against the City and Fagan.

B. State Law Claims

The Court next turns to Rodis's state law claims for damages. A municipality can be held liable under a respondeat superior theory for its employee's violation of state law. *See* Cal. Gov't Code § 815.2 (a) ("A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.") For the reasons stated above, defendants have not shown that Rodis, as a

matter of law, was not subjected to an unreasonable seizure.

Accordingly, defendants are not entitled to summary judgment on the state law claims asserted against the City and Fagan, to the extent such claims are predicated on the unreasonableness of the seizure, and are entitled to summary judgment on the state law claims asserted against the City and Fagan, to the extent such claims are predicated on a deprivation of equal protection.

III. Claim for Injunctive Relief

Rodis alleges, in his Third Cause of Action, that he is entitled to an injunction compelling defendants "to allow [Rodis] to be free of discriminatory treatment by [d]efendants." (*See* SAC ¶ 29.)

Defendants argue that Rodis lacks standing to seek the requested injunctive relief. *See City of Los Angeles v. Lyons,* 461 U.S. 95, 105 (1983) (holding plaintiff who had been injured by officers' use of specific type of chokehold, lacked standing to seek injunction against future use of such chokehold because plaintiff did not establish "real and immediate threat" he would again be subjected to such chokehold). Plaintiff, in his opposition, fails to respond to this argument, and, in any event, fails to offer any evidence to establish his standing to seek the requested injunction.

Accordingly, defendants are entitled to summary judgment on the Third Cause of Action.

CONCLUSION

For the reasons stated above, defendants' motion for summary judgment is hereby GRANTED in part and DENIED in part, as follows.

1. Defendants are entitled to summary judgment on the Third Cause of Action, and on all claims, to the extent they are based on an equal protection deprivation theory.

2. Defendants City and Fagan are entitled to summary judgment on Rodis's federal claims for damages.

3. In all other respects, the motion is denied.

This order terminates Docket No. 38

IT IS SO ORDERED.

Dated: March 22, 2004

/s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RODEL E. RODIS, Plaintiff-Appellee, v. CITY AND COUNTY OF SAN FRANCISCO, a municipality; et al., Defendants-Appellants, and SAN FRANCISCO POLICE DEPARTMENT, Defendant.	No. 05-15522 D.C. No. CV-04-00314-MMC Northern District of California, San Francisco ORDER (Filed Sep. 10, 2007)

Before: D.W. NELSON and CALLAHAN, Circuit Judges, and CARNEY,* District Judge.

Appellants' Motion for Extension of Time to File Petition for Rehearing and Petition for Rehearing En Banc is GRANTED. A petition for rehearing/rehearing en banc shall be filed on or before October 12, 2007.

SO ORDERED.

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* The Honorable Cormac J. Carney, United States District Judge for the Central District of California, sitting by designation.

98

(2)

No. 07-1376

FILED
JUL 1 - 2008
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, SERGEANT JEFF BARRY, OFFICER MICHELLE LIDDICOET, and ALEX FAGAN,

Petitioners,

v.

RODEL E. RODIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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July 2008

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does the mere act of passing a suspected counterfeit bill, by and of itself, furnish police officers with sufficient probable cause to arrest an individual pursuant to 18 U.S.C. § 472, even if the arresting officers have absolutely no evidence of any "intent to defraud" – an element required to prove a violation of the statute?

2. Are the officers who arrested Respondent for tendering a $100 bill, authentic by all indications but which had allegedly appeared suspicious-looking to the store personnel, entitled to qualified immunity even where the officers had no objective evidence that a crime pursuant to 18 U.S.C. § 472, or any other crime, had been committed, was being committed or was being attempted, and even where they knew Respondent on a personal basis and as a leading public figure in his ethnic community and in the general community?

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1

INTRODUCTION 2

STATEMENT OF THE CASE 6

I. FACTUAL BACKGROUND 6

II. THE PROCEEDINGS BELOW 10

REASONS FOR DENYING THE PETITION 11

I. REVIEW IS NOT WARRANTED BECAUSE THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OVER THE PROPER APPLICATION OF THE DOCTRINES OF PROBABLE CAUSE AND QUALIFIED IMMUNITY 11

II. REVIEW IS ALSO NOT WARRANTED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS OVER WHETHER PROBABLE CAUSE AS TO THE INTENT ELEMENT HAS TO FIRST BE PRESENT BEFORE AN INDIVIDUAL MAY BE ARRESTED FOR SUSPECTED VIOLATION OF 18 U.S.C. SECTION 472 15

TABLE OF CONTENTS – Continued

Page

A. Probable cause as to the intent element existed in the out-of-circuit cases cited by Petitioners 16

B. Probable cause as to the intent element existed in the Ninth Circuit cases cited by Petitioners 19

III. GRANTING THE PETITION AND THE CALENDARING OF THE CASE FOR ARGUMENT WITH *PEARSON* IS NOT WARRANTED BECAUSE *SAUCIER* AND *PEARSON* ARE COMPLETELY DISTINGUISHABLE FROM THE INSTANT CASE..... 23

IV. PUBLIC POLICY CONSIDERATIONS MILITATE STRONGLY AGAINST GRANTING THE PETITION..... 26

CONCLUSION..... 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Baker v. McCollan, 443 U.S. 137 (1979) 14, 15

Bates v. U.S., 352 F.2d 399 (9th Cir. 1965) 22

Brinegar v. United States, 338 U.S. 160 (1949) 3, 11, 12

Callahan v. Millard County, 494 F.3d 891 (10th Cir. 2007) 24

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 12

Illinois v. Gates, 462 U.S. 213 (1983) 3, 11, 12

Locke v. United States, 7 Cranch 339 (1813) 11

Marks v. Carmody, 234 F.3d 1006 (7th Cir. 2000) 18

Maryland v. Pringle, 540 U.S. 366 (2003) 3, 12

U.S. v. Allison, 616 F.2d 779 (5th Cir. 1980) 18

U.S. v. Blum, 432 F.2d 250 (9th Cir. 1970) 21

U.S. v Ford, 461 F.2d 534 (9th Cir. 1972) 19, 20

U.S. v. Everett, 719 F.2d 1119 (11th Cir. 1983) 17, 20

U.S. v. Hernandez, 825 F.2d 846 (5th Cir. 1987) 17

U.S. v. Mayo, 394 F.3d 1271 (9th Cir. 2005) 22, 23

Ornelas v. United States, 517 U.S. 690 (1996) 12

Pearson v. Callahan, No. 07-751 ..... 3, 4, 23, 24, 25

Saucier v. Katz, 533 U.S. 194 (2001) 4, 24, 25

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES & CONSTITUTIONAL PROVISIONS

18 U.S.C. § 472 .....2, 4, 13, 15, 26

42 U.S.C. § 1983 .....1, 10

U.S. Const. amend. IV.....1, 3, 10, 15, 24, 29

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

18 U.S.C. § 472 states:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both.

INTRODUCTION

In their petition, Petitioners contend that the Ninth Circuit erred in holding that "an officer may not arrest an individual on suspicion of passing a counterfeit bill unless the officer has evidence of 'intent to defraud' above and beyond the intent inferred from the passing of the bill." Petition ("Pet.") 3. Petitioners also claim that the appellate court's holding "creates a split with the Eleventh and Fifth Circuits, both of which have made clear that an attempt to pass a counterfeit bill is sufficient to establish a probable cause to arrest." *Id.* at 3-4. Petitioners further insist that "[e]very decision in existence at the time of the arrest had held or implied that officers may arrest an individual on suspicion of passing a counterfeit bill when the individual attempts to pass the bill, and that no additional evidence of intent to defraud is required to establish probable cause." *Id.* at 4. Lastly, Petitioners are asking this Court to grant

the writ and calendar the case for argument with *Pearson v. Callahan*, No. 07-751, allegedly because *Pearson* and Respondent's case are "virtually identical." *Id.* at 22 n.3.

Petitioners' contentions reflect a dark, worrisome and patently unreasonable interpretation of this country's deeply rooted laws, both constitutional and statutory. Fortunately for all Americans, Petitioners' claims are unmeritorious, unwarranted and simply wrong. The police are not entitled to qualified immunity in circumstances like the present case where they failed to conduct any investigation as to whether Respondent intended to pass counterfeit currency, chose to ignore an abundance of factual circumstances which, by all reasonable interpretations, indicated that Respondent did not intend to pass counterfeit currency, and yet still arrested Respondent.

Firstly, Petitioners overlook the factual contexts and the totality of circumstances in the in-circuit cases they cited, all of which are manifestly distinguishable from Respondent's case. Moreover, the appellate court's fact-bound analysis in Respondent's case and the ultimate decision it rendered was consistent with this Court's clearly enunciated holdings in cases involving the proper application of the doctrines of probable cause and qualified immunity. *See Maryland v. Pringle*, 540 U.S. 366 (2003); *Illinois v. Gates*, 462 U.S. 213 (1983); *Brinegar v. United States*, 338 U.S. 160 (1949). In keeping with the mandate of the Fourth Amendment, this Court has never derogated the need to satisfy probable cause as to the intent

element prior to effecting any type of arrest, and there is simply no compelling argument to make an exception when the matter involves suspected counterfeit currency.

Secondly, Petitioners' claim of conflict among the circuits is likewise illusory. There is no split among the circuits as to whether probable cause as to the intent element has to first be present before an individual may be arrested for suspected violation of 18 U.S.C. § 472. Again, even a cursory review of the factual background of the out-of-circuit cases Petitioners cited suggests that, unlike in Respondent's case, the arresting officers had reasonable bases before they effected the contested arrests, thereby satisfying probable cause as to the intent element.

Thirdly, Petitioners' attempt to use Respondent's case as a vehicle to insert themselves in the matter of *Pearson* is misguided. Even allowing for the possibility that Petitioners may have something of value to provide this Court in its deliberations on whether the holding in *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled, Respondent's case differs so markedly with *Pearson* (or even *Saucier*) such that Petitioners' contention that they are "virtually identical" is very much a stretch. The simple fact of the matter is that, very much unlike the plaintiffs in *Pearson* and *Saucier*, Respondent, known to the officers at the time of his arrest to be an elected public official and a leading figure in his ethnic community and the general community, did nothing remotely unlawful except tender a bill acquired in the

regular stream of commerce to complete a regular purchase at the store where he was arrested.

Petitioners are urging this Court to disregard the law's requirement of them to exercise reasonableness in conducting an arrest and are asserting the defense of qualified immunity even where the arrest was completely unjustified under the circumstances. The doctrine of probable cause should not be diluted to the level asked for by Petitioners because permitting them to do so effectively turns the defense of qualified immunity into one of absolute immunity.

Lastly, the Court should not disturb the well-reasoned decision of the Ninth Circuit and deny Petitioners' petition for a writ of certiorari because there are compelling public policy reasons which are manifest and which militate strongly against ruling on behalf of Petitioners. Curbing possible police abuses in conducting seizures and arrests is one such public policy consideration; preventing an ordinary citizen from maliciously having a fellow citizen arrested on the pretext that the latter was passing what "appeared" to the former to be a counterfeit bill is another. Indeed, the ramifications of a ruling favorable to Petitioners are significant and untenable.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On February 17, 2003, Respondent performed the everyday action of paying in a retail store with U.S. currency when he attempted to purchase several items at his local Walgreens store with a $100 bill, 1985 series. The bill he used did not appear unusually old or wrinkled, and it had the normal texture of other $100 bills he had in his possession, all of which were genuine. Nonetheless, Walgreens' store manager Dennis Snopikov, after examining the bill with a counterfeit detector pen which indicated that the bill was genuine, called the San Francisco Police Department (SFPD) and reported that he had suspicions about a bill, that he was not sure but he thought it might be counterfeit.

When the first two SFPD police officers, Sgt. Jeff Barry and his partner, Officer Barbara Dullea, arrived at the scene, Sgt. Barry recognized the Respondent but made no attempt to approach either the Respondent or the Walgreens manager, who were engaged in a civil conversation. The officers then reported a Code 4, that the "situation was under control," to a second squad car, and waited at the door for the other officers to arrive. The officers in the second squad car, composed of Officers Michelle Liddicoet and James Nguyen, understood Code 4 to mean "suspect in custody" and expected to see the Respondent already in handcuffs upon their arrival. However, when they entered the Walgreens store,

Officers Liddicoet and Nguyen saw that the suspect was not in custody as earlier reported, so they proceeded to place handcuffs on Respondent.

Just before placing the handcuffs on the Respondent, Officer Nguyen spoke briefly with the Walgreens manager while Officer Liddicoet spoke with the Respondent. The Walgreens manager told Officer Nguyen that he had compared the $100 bill with a genuine bill, and that he was uncertain about the authenticity of the bill Respondent had used. The officers never looked at the "other" $100 bill which the Walgreens manager said he had compared it with, and which he said had a watermark and a magnetic security strip. They also never engaged in any investigation about whether Respondent had any intent to defraud Walgreens.

Although Sgt. Barry was the first to arrive and was the ranking officer at the scene, he told Officer Liddicoet not to mention his name in the police report. Aside from the fact that Sgt. Barry knew that Respondent was a lawyer and an elected member of the Community College Board of the City College of San Francisco (CCSF), Sgt. Barry also personally knew Respondent because Sgt. Barry headed the boys athletic program of the parochial school where Respondent's sons were enrolled and where their sons were classmates. The last time they spoke, Sgt. Barry had expressed negative feelings against Respondent, claiming that Respondent and the other members of the CCSF Board of Trustees had placed his brother-in-law, a police officer at CCSF, at risk for

physical harm because they did not allow CCSF police officers to carry firearms on campus.

When Officer Liddicoet arrived at the Walgreens store, Sgt. Barry informed Officer Liddicoet that Respondent was a lawyer, an elected public official, and that Respondent did not like police officers.[1] Officer Liddicoet thereafter entered the store and, after telling Respondent she knew who he was, told Respondent that he "should be ashamed" of himself, placed Respondent in handcuffs without ever making any effort to inspect the other $100 bill which the Walgreens manager had allegedly compared the suspected bill to, without inspecting a third $100 bill which Respondent had used to complete his purchase, and without inspecting any of the other bills Respondent may have had in his possession at the time.

Respondent was transported in the back of a squad car to a police station with his hands handcuffed behind his back and his knees pressed up. After arriving at the police station, Respondent was then put in a holding area with one of his wrists

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[1] Officer Liddicoet originally denied having been told anything by Sgt. Barry about Respondent. After cross-examination, she changed her testimony and admitted that Sgt. Barry had told her something about Respondent. In her revised testimony, however, she claims that he told her this only after Respondent was released. In view of her contradictory testimony and her conduct, it appears more likely that she was told these things (that Respondent dislikes police officers) when she arrived at the scene and that this was part of the reason Officer Liddicoet was in a rush to place the Respondent in handcuffs.

handcuffed to a metal bar, which significantly restrained his movement.

Needing assistance in ascertaining the genuineness of the bill, Officer Nguyen called the Secret Service but was unable to speak with an agent immediately, so he left a message requesting a return call. After about thirty minutes, a Secret Service agent returned the call, discussed the details of the suspected bill with Officer Nguyen, and concluded that the bill was in fact genuine.

Several more minutes later, Respondent was released from custody, and Officer Nguyen drove him back to Walgreens. At the time Respondent was released, Officer Nguyen admitted to Respondent that he knew all along that the bill was real, and that he told the other officers that he thought it was real.[2]

During the arrest, the drive to the police station in the back of the squad car, and the detention at the police station, Respondent suffered injuries to his back which required chiropractic care, injuries to his wrist, and emotional distress.

Shortly after the incident, the SFPD issued a formal memorandum which set forth specific procedures to be followed when investigating suspected

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[2] Sgt. Barry testified that he did not handle the bill himself and was 10-50 feet away from the officers handling the bill. Officer Liddicoet admitted at her deposition that the suspected bill actually looked real to her.

counterfeit currency incidents. The new policy now requires police officers to conduct an investigation into the element of intent before they can make an arrest.

II. THE PROCEEDINGS BELOW

On October 1, 2003, Respondent filed a complaint against the City and County of San Francisco, then Chief of Police Alex Fagan, Sgt. Barry and Officer Liddicoet under 42 U.S.C. Section 1983 for false arrest and excessive force in violation of Respondent's Fourth Amendment rights, conspiracy to violate said rights, injunctive relief, and several state law claims.

On February 11, 2005, Petitioners moved for summary judgment, and on March 22, 2005, the U.S. District Court for the Northern District of California granted the motion as to Respondent's conspiracy, municipal liability and injunctive relief claims, but denied the motion in all other respects after finding that, because the officers lacked evidence regarding Respondent's intent to defraud, probable cause was necessarily lacking and the arrest was therefore unlawful. The district court also found Sgt. Barry and Officer Liddicoet not entitled to qualified immunity because the illegality of the arrest was clearly established at the time. Petitioners' Appendix ("Pet. App.") 33; *see also* 2004 WL 326273 (N.D. Cal.).

On April 20, 2005, Petitioners appealed to the Court of Appeals, and on August 28, 2007, the Ninth Circuit, after hearing oral arguments from the parties,

affirmed the district court's decision. Pet. App. 1; *see also* 499 F.3d 1094 (9th Cir. 2007). On October 12, 2007, Petitioners filed a petition for the Ninth Circuit to rehear and rehear *en banc* its August 28, 2007 decision. The petition was denied on February 6, 2008. Pet. App. 51. The petition with this Court thereafter followed.

REASONS FOR DENYING THE PETITION

I. REVIEW IS NOT WARRANTED BECAUSE THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OVER THE PROPER APPLICATION OF THE DOCTRINES OF PROBABLE CAUSE AND QUALIFIED IMMUNITY.

The doctrine of probable cause is grounded in a long history of case law. "As early as *Locke v. United States,* 7 Cranch 339, 348 (1813), Chief Justice Marshall observed: '[T]he term "probable cause" . . . imports a seizure made under circumstances which warrant suspicion.'" *Gates,* 462 U.S. at 235. This Court has repeatedly held that the "substance of all the definitions of probable cause is a reasonable ground for belief of guilt." *Brinegar*, 338 U.S. at 175. This commonsensical standard "protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing the law in the

community's protection.'" *Pringle*, 540 U.S. at 370 (quoting *Brinegar*, 338 U.S. at 176).

"[P]robable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232. The doctrine "deals with probabilities and *depends on the totality of circumstances*." *Pringle*, 540 U.S. at 371 (italics added). Thus, in determining whether an officer had probable cause to make an arrest, a court must "examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Id.* (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)).

The doctrine of qualified immunity is similarly well-grounded in reasonableness. As clearly enunciated by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), qualified immunity is designed to shield government agents from actions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Further, in *Harlow*, this Court ruled that "[t]he public interest in deterrence of unlawful conduct and in compensation of victims remains protected by *a test that focuses on the objective legal reasonableness of an official's acts*." *Id.* at 819 (italics added).

The Ninth Circuit's analysis in Respondent's case involved the fact-bound application of well-settled law as briefly outlined above. After poring over the record, the appellate court concluded that "the circumstances surrounding Rodis's arrest fell *far short* of creating a 'fair probability' he had committed *any* crime, much less the crime in question." Pet. App. 9 (citation omitted). The court also noted that "[t]he record shows, and Defendants concede, they had no evidence whatsoever demonstrating that Rodis intended to use the bill to defraud the store, nor was there any reason to believe Rodis believed the bill was fake." *Id.* at 11. Further, the court pointed out:

> What is more, several facts known to the officers at the time of the arrest significantly *decreased* the probability that Rodis violated § 472. Viz., Rodis had other $100 bills in his possession that were genuine, one of which he used to complete the transaction; the counterfeit detector pen indicated the bill was genuine; and the officers knew Rodis was both a San Francisco attorney and a locally-elected public official with strong ties to the community in which the store was located. Specifically, Barry had known Rodis for several years. He knew Rodis was a member of the Community College Board, and he had interacted with Rodis personally, encountering him at activities associated with the elementary school that both Barry's and Rodis's children attended. Also, Rodis informed Liddicoet prior to his arrest that he was a public figure, and that he lived and

> worked within two blocks of the store. Liddicoet told him she knew who he was and that he "should be ashamed" of himself.

Id. at 12.

The Ninth Circuit also concluded that "even without the knowledge of Rodis's identity and local ties, based on the totality of the other relevant facts, no reasonable or prudent officer could have concluded that Rodis intentionally and knowingly used a counterfeit bill." *Id.* at 13. In effect, the police officers ignored all of the evidence indicating the Respondent did not intend to pass counterfeit currency and arrested him.

Despite these reasonable findings of the court, Petitioners insist that the Ninth Circuit decision is in tension with this Court's holding that "an officer is not required to investigate every claim of innocence and every potential defense 'such as lack of requisite intent' before making an arrest." Pet. 15. Only *Baker v. McCollan*, 443 U.S. 137 (1979), was cited by the Petitioners to this contention and no other Supreme Court case.

However, even in *Baker*, this Court never derogated the need to satisfy probable cause as to the intent element prior to effecting an arrest. In fact, there is no language in *Baker* that suggests that police officers are completely relieved of the need to have reasonable basis for probable cause as to the intent element; likewise, none of the cases cited by Petitioners hold that police officers can ignore the

abundant evidence of a person's innocence and still arrest said innocent person.

Moreover, the facts of *Baker* are hardly comparable to the instant case because *Baker* was a narrowly decided case of mistaken identity, in which the plaintiff was arrested because his brother, who had an outstanding warrant of arrest, had been masquerading as the plaintiff himself by using a duplicate of plaintiff's driver's license, identical to the original in every respect except that plaintiff's brother's picture graced it instead of the plaintiff's. *Baker*, 443 U.S. at 140. Hence, given the totality of circumstances in that case, the Court ruled that the plaintiff was detained pursuant to a warrant which conformed to the constitutional requirements of the Fourth Amendment. *Id.* at 144. Because the same cannot be reasonably said in the instant case, Petitioners did not have probable cause and therefore cannot be granted immunity from suit.

II. REVIEW IS ALSO NOT WARRANTED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS OVER WHETHER PROBABLE CAUSE AS TO THE INTENT ELEMENT HAS TO FIRST BE PRESENT BEFORE AN INDIVIDUAL MAY BE ARRESTED FOR SUSPECTED VIOLATION OF 18 U.S.C. SECTION 472.

Petitioners contend that this Court should grant review to resolve a conflict in the appellate courts on whether probable cause as to the intent element

is necessary in order to make an arrest. Pet. 13. Petitioners also claim that the Ninth Circuit's decision in Respondent's case conflicts with its "own past rulings, which have strongly implied that evidence of intent beyond the passing of the bill is not required for counterfeiting arrests." *Id.* at 14.

No such conflict exists, whether within the Ninth Circuit or among the circuits. What does exist is a consistent misreading of the holdings because Petitioners overlook the totalities of circumstances in each of the cases they cited, and in none of the cases cited by Petitioners was there an abundance of evidence, as in the present case, which indicated that the suspect did not have any intention to pass counterfeit currency.

A. Probable cause as to the intent element existed in the out-of-circuit cases cited by Petitioners.

A review of the out-of-circuit cases cited by Petitioners reveals that the factual contexts and the totalities of circumstances in these cases support the conclusion that probable cause as to the intent element in fact existed. Further, none of the cases cited by Petitioners set forth facts similar to the ones cited by the District Court in its opinion which pointed to the innocence of Respondent. Thus, Respondent's case is easily distinguishable from the cited cases, as follows:

(a) ***U.S. v. Everett***, 719 F.2d 1119 (11th Cir. 1983). Petitioners are pinning their argument strongly on this 1983 case where the defendant "appeals from judgments of conviction on four counts of conspiracy to pass counterfeit currency, passing counterfeit currency, possessing counterfeit currency, and concealing counterfeit currency." *Id.* at 1120. Here, the Eleventh Circuit did say that "[t]he passing of a counterfeit note coupled with an identification of the person who passed the note furnishes probable cause," but the opinion also mentioned that "appellant and another individual, who were seated at the same table in a lounge, each passed $50.00 *bills* which were *identified by a deputy sheriff to be counterfeit.*" *Id.* (italics added). Thus, even though the two-paragraph opinion is bereft of facts, it is reasonable to conclude that the appellate court, not wishing to disturb the judgments of conviction, simply deferred to the factual conclusions of the trial court and therefore did not see it necessary to elaborate any further. However, the plural word "bills," along with the conspiratorial impression that may be evoked in any reasonable person by witnessing two individuals each passing $50 bills in a lounge, plus the conclusive identification by the deputy sheriff of these bills to be counterfeit, distinguish *Everett* from Respondent's case.

(b) ***U.S. v. Hernandez,*** 825 F.2d 846 (5th Cir. 1987). In this case, the officers accosted Hernandez and his companion after being tipped off by a vendor in a carnival who earlier refused to change a $20 bill

he suspected of being counterfeit. *Id.* at 848. However, the officers had numerous reasonable bases for probable cause and effecting a subsequent arrest because (a) initially, "[a]s the officers approached, Hernandez and his companion started away"; (b) when one of the officers conducted a pat-down search, felt "a crumpled piece of paper" in Hernandez's pocket, and asked what it was, "Hernandez replied that it was nothing and twice refused to show the paper"; and (c) when the officer reached into the pocket, he "retrieved a black and white mimeograph copy of a twenty dollar bill." *Id.*

(c) ***U.S. v. Allison***, 616 F.2d 779 (5th Cir. 1980). The two arrestees in this case, Allison and Freedman, were also convicted of possession of counterfeit bills. *Id.* at 781. The Fifth Circuit pointed out that "[a]lthough mere possession of counterfeit money is not a crime, when possession is coupled with reliable information that the possessor has attempted to pass the bill as genuine, the officer in the field is justified in concluding that an offense has been committed." *Id.* at 782. In its decision to affirm Allison's conviction, the court concluded that the police officer had probable cause to arrest because the arrestee exhibited not just one but three counterfeit $20 bills, and a subsequent search of his car's trunk yielded a travel shaving kit containing 117 counterfeit $20 bills. *Id.*

(d) ***Marks v. Carmody***, 234 F.3d 1006 (7th Cir. 2000). This case was not a case involving counterfeit currency; instead, it involved two competing travel

agency operators who decided initially to merge their operations but because of some disagreement involving unpaid tickets and commissions, ended up terminating the merger, with one party filing a criminal complaint against the other (Marks) for fraud stemming from Marks' issuance of checks returned for insufficient funds. *Id.* at 1007-1008. In Marks' suit against the officers who arrested him, the court ruled that "even though it was not prepared to hold that there was probable cause for the arrest, the two officers were entitled to qualified immunity on this record" because the arrest came after several months of investigation by the detective in this case who had his legitimate reasons to believe that there was indeed fraud involved and therefore reasonably thought arresting Marks was lawful. *Id.* at 1009.

B. Probable cause as to the intent element existed in the Ninth Circuit cases cited by Petitioners.

Petitioners' contention that the Ninth Circuit's own past rulings "have strongly implied that evidence of intent beyond the passing of the bill is not required for counterfeiting arrests" (Pet. 14) is similarly negated by the factual contexts and the totalities of circumstances in the circuit cases they cited which suggest that probable cause existed as to the intent element, as follows:

(a) ***U.S. v. Ford***, 461 F.2d 534 (9th Cir. 1972). This is another case of a defendant appealing a

conviction involving counterfeit currency, with the appellate court affirming the trial court judgment. The counterfeit bill fell out of defendant's clothing during a pat-down search for weapons after defendant, who "matched the storekeeper's description," was stopped by a cruising officer who responded to a storekeeper's report that defendant had earlier attempted to negotiate counterfeit currency. *Id.* Similar to their championing of *Everett*, Petitioners are pinning their interpretation of probable cause on this case because it is but a conclusory, two-paragraph opinion which, as the Ninth Circuit opinion in Respondent's case noted, "is so lacking in factual background, that what the panel deemed sufficient for probable cause is unknown." Pet. App. 17. However, even with the minimal facts in *Ford*, Respondent's case is distinguishable because the record reveals that, unlike in *Ford*, (1) the Walgreens manager who summoned the officers for assistance was simply uncertain about the authenticity of the bill; (2) at least two of the officers who responded at the scene thought the Respondent's bill in fact looked genuine; and (3) the officers knew Respondent personally and were aware that he was a lawyer and an elected public official. Further, none of the evidence in the *Ford* case tended to show the innocence of the person being arrested. Thus, to decide the questions presented before this Court in favor of Petitioners purely based on their interpretation of the two-paragraph opinion in *Ford* is to condemn the doctrine of probable cause to meaninglessness. It is difficult to imagine that the *Ford* court really meant this to be

so; if it were, all opinions after *Ford* involving counterfeit currency cases would all just consist of two conclusory paragraphs similarly devoid of other relevant facts and legal discussions.

(b) ***U.S. v. Blum***, 432 F.2d 250 (9th Cir. 1970). The defendant in this case was appealing a conviction after he was arrested without a warrant by a Louisiana State Trooper who had earlier heard a radio broadcast from the police captain of a small Louisiana town urging officers to be on the lookout for a white male driving a convertible with California plates and believed to have tendered counterfeit bills at a local gas station. *Id.* at 252. A subsequent search of defendant's vehicle resulted in the seizure of "a canvas bag containing about $15,000.00, a gun, ammunition, polo shirt, cap, glasses and a sock." *Id.* at 253. As the Ninth Circuit noted in the opinion, "*Blum* is easily distinguishable" from Respondent's because "numerous facts – such as the suspect fleeing the scene and the fact the suspect lived outside the state – could have been enough to create a 'fair probability' he passed counterfeit bills." Pet. App. 16 n.5. Additionally, the court noted that "*Blum* is an old case, and since it was decided (nearly forty years ago), we have made clear that (1) 'the key element of section 472 is the specific intent to defraud,' and (2) 'when specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred.'" *Id.* (citations omitted).

(c) ***Bates v. U.S.***, 352 F.2d 399 (9th Cir. 1965). Bates was appealing the conviction of two counterfeiting counts but the Ninth Circuit affirmed after holding that the officer who had arrested Bates had probable cause because plaintiff's "automobile carried out-of-state license plates and was distinct in model and color," and "[t]he officer already had reliable information that the vehicle fitted the description of one which, very shortly before, had been entered by a person who had passed counterfeit money at a store in the near vicinity." *Id.* at 400. The court went on to say that "[o]f course, at the time of the arrest, the circumstances pointing to Bates as a participant in counterfeit transactions were not iron clad, but they certainly pointed an accusing finger at him – enough for probable cause." *Id.*

(d) ***U.S. v. Mayo***, 394 F.3d 1271 (9th Cir. 2005). In *Mayo*, the court ruled that the police, which found stolen mail in defendant's car, had reasonable bases to detain defendant for suspicion that he committed or participated in a crime because (a) there were earlier reports of suspicious activity, possibly involving narcotics, near the motel where defendant was arrested; (b) defendant was using a car with a stolen registration sticker on a license plate; (c) defendant tried to use someone else's credit card to rent a motel room; and (d) officers at the scene smelled chemical odor associated with methamphetamine. *Id.* at 1275-1276. However, Petitioners' reliance on this case is misplaced because in concluding that the arrest was constitutional, the court specifically reiterated

the standard for probable cause – i.e., "whether, under the totality of the circumstances, a prudent officer would have believed that there was a fair probability that the suspect committed a crime." *Id.* at 1276 (citation omitted).

In view of the above, a reasonable person, police officer or not, would find the totalities of the circumstances in the cases cited by Petitioners easily distinguishable from Respondent's case because the officers who arrested Respondent knew him, were aware of his standing in the community as an elected public official, and did not really have any factual basis to have any reasonable suspicion that he was trying to pass a counterfeit bill. Thus, in the absence of a concrete or mature conflict in the circuits, the question presented does not warrant this Court's review.

III. GRANTING THE PETITION AND THE CALENDARING OF THE CASE FOR ARGUMENT WITH *PEARSON* IS NOT WARRANTED BECAUSE *SAUCIER* AND *PEARSON* ARE COMPLETELY DISTINGUISHABLE FROM THE INSTANT CASE.

Petitioners are asking this Court to grant the petition and calendar the argument together with *Pearson* because they contend that "the qualified immunity issues presented by [*Pearson* and the instant case] are virtually identical." Pet. 22 n.3. However, this contention is without merit. In *Pearson*, the

plaintiff was a suspected drug pusher who was arrested by police officers inside his home without an arrest or search warrant after he supplied drugs to a confidential informant in exchange for a $100 bill which had earlier been marked by the police. The search of plaintiff and his home yielded a small bag of methamphetamine, the marked bill and drug syringes. The issue before the Tenth Circuit was whether the arresting officers were entitled to qualified immunity because of the Fourth Amendment's "consent-once-removed" doctrine which applies "when an undercover officer [broadened by other circuits to also include informants] enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance." *Callahan v. Millard County*, 494 F.3d 891, 896 (10th Cir. 2007), rev'd sub nom. *Pearson v. Callahan*, No. 07-751 (2008).

In granting certiorari in *Pearson*, the Court directed the parties to argue the question of whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled. However, *Saucier* is likewise easily distinguishable from Respondent's case. The plaintiff in *Saucier*, the president of a group called "In Defense of Animals" who had earlier entered a military base with a protest banner concealed under his jacket, was rushed by military police officers when he "removed the banner from his jacket, started to unfold it and walked toward the fence and

the speakers' platform" where then-Vice President Al Gore was speaking. *Id.* at 197-198. He was subsequently taken to a military van, shoved or thrown inside, driven to and held at a military police station for a brief time, and then released. *Id.* at 198. He sued the military officers who arrested him, allegedly for excessive force. *Id.* at 199.

Clearly, the facts and circumstances in Respondent's case are totally different. Even without regard to the decisions reached by all the courts which tried the cases as well as the eventual decision of this Court, any reasonable person can sympathize with, and raise obvious and legitimate arguments in favor of, the arresting officers in both *Pearson* and *Saucier*. On the other hand, Respondent did not do anything remotely unlawful. Respondent's only fault for being arrested was for tendering a 1985 series $100 bill which he acquired in the regular stream of commerce and which in fact turned out to be genuine. The officers who responded to the scene knew Respondent to be a lawyer and a prominent figure in the city's political arena. They also knew him to be among the leading figures in his ethnic community, that he lived and worked in the immediate neighborhood of the store. They arrested him nonetheless after ignoring an abundance of evidence which tended to show that he did not intend to pass counterfeit currency.

It is clear from the record that Respondent in fact is the one who has probable cause for suspecting that there may have been other motivations for the conduct of at least one of the Petitioners. Respondent is

seeking to prove this and the Court should let the trial court proceed with its task and not allow Petitioners to hide behind the shield of qualified immunity. By invoking qualified immunity, Petitioners are effectively urging this Court to disregard the law's requirement of them to exercise commonsensical prudence and reasonableness. Thus, adopting Petitioners' interpretation of qualified immunity will effectively afford petitioners absolute immunity for arrests involving, at the very least, suspected violators of 18 U.S.C. § 472.

IV. PUBLIC POLICY CONSIDERATIONS MILITATE STRONGLY AGAINST GRANTING THE PETITION.

Section 472's language specifically contains the phrase "intent to defraud" as an element of the crime. The phrase is critical because it modifies several verbs that follow it, including "passes," "utters," "publishes," "sells," "attempts to pass," "keeps in possession," among others. 18 U.S.C. § 472. It is easy to see why evidence pertaining to this element should not be dispensed with in making arrests pursuant to the statute.

Petitioners, however, wish to diminish the importance of the phrase and argue that "[j]ust as a factfinder may infer from the fact that a person is driving a stolen vehicle that he did, in fact, steal the vehicle, a factfinder may infer from the fact that a person attempted to pass a counterfeit bill that he intended

to defraud the person to whom he passed the bill." Pet. 15 n.2. However, comparing the two acts – driving a stolen vehicle vs. attempting to pass a *suspected* (a modifier Petitioners consistently drop) counterfeit bill – is like comparing a dog to an ant; quite simply, the two are completely different animals.

Unlike the second act, the first act – driving a stolen vehicle – requires from a suspect a more creative imagination in order to come up with a reasonable excuse to a questioning police officer, and chances are, the police officer will have sufficient probable cause to make an arrest. After all, unlike bills, cars are not what one would consider fungible, disposable or indistinguishable from the others. Unlike bills which fit easily in wallets and pockets, cars are bulky and difficult to hide. Unlike bills, cars have glove compartments where proofs of purchase, registration papers and insurance are stored. And not to belabor the point, cars, though fast in the highways, cannot even compare with bills when the velocity at which the latter change hands in the regular course of business is taken into account.

And this is really where the crux of the difference lies: unlike a regular person who uses cash daily, a typical driver does not wake up and drive a different car each day. A typical driver does not have multiple cars which all look alike. A typical driver does not transact and/or exchange cars on a daily basis, whether with friends, family, vendors, banks, or machines like ATMs.

Respondent's case raises the question of whether it is acceptable for officers to arrest an individual purely because, in the conduct of his daily affairs, he acquired what to him was a regular bill (but apparently suspicious-looking to a store cashier) which he then used to complete a regular commercial transaction. It also raises the question of whether police officers can disregard circumstances which negate the possibility of any crime being committed by the suspect, arrest him purely on the aforementioned basis, and, in the process, dispense, maliciously, negligently, recklessly or otherwise, with the principles of reasonableness, probable cause and criminal intent.

The opinion of the Ninth Circuit zeroed in on this issue quite succinctly:

> Without at least some evidence regarding the knowledge or intent elements of the crime, probable cause is necessarily lacking. To hold otherwise would render any individual vulnerable to arrest who unknowingly, through the normal stream of commerce, comes to possess or use a counterfeit bill, even if other circumstances suggest that a crime has not been committed. This is not and cannot be the law.

Pet. App. 13.

Thus, if validated by this Court, Petitioners' interpretation of the relevant law carries worrisome public policy implications. Counterfeit currency arrests will be fraught with risks of abuse by police

officers. It is also not difficult to imagine that an ordinary citizen knowledgeable about this particular application of the law may use his knowledge to get a fellow citizen arrested under the malicious pretext that the latter was passing what "appeared" to be a counterfeit bill. Indeed, this cannot and should not be the law.

Lastly, Petitioners' contention that the Ninth Circuit's holding "creates significant practical problems for enforcement of the counterfeiting laws" (Pet. 16) is exaggerated and the Court should not be persuaded for the simple reason that this contention is belied by the new SFPD policy issued shortly after the incident which now requires the officers investigating counterfeit currency incidents to conduct an investigation into the element of intent. The new SFPD policy is an implicit admission that conducting an investigation into the element of intent is in fact reasonable and conforms to the Fourth Amendment's constitutional protection against unreasonable searches and seizures.

CONCLUSION

Petitioners are wrong on the merits and have forwarded no persuasive argument for granting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO,
SERGEANT JEFF BARRY,
OFFICER MICHELLE LIDDICOET, and ALEX FAGAN,

Petitioners,

v.

RODEL RODIS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' REPLY SUPPORTING PETITION FOR WRIT OF CERTIORARI

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1. Although, given Respondent's delay in filing his Brief in Opposition, it is too late to calendar this case for argument with *Pearson v. Callahan*, the Court nonetheless should grant certiorari on the first question presented, namely, whether probable cause for passing a counterfeit bill requires evidence of intent above and beyond the passing of the bill. Respondent is correct that the facts of *United States v. Everett*, 719 F.2d 1119 (11th Cir. 1983), and *United States v. Hernandez*, 825 F.2d 846 (5th Cir. 1987), were different from the facts below. But, that is unremarkable and irrelevant. By definition, all cases involving probable cause involve different facts. That observation does nothing to change the reality that there are now conflicting rules among the circuits about the probable cause requirements for an arrest on suspicion of passing counterfeit currency. In the Ninth Circuit, an arresting officer must now have evidence of intent to defraud above and beyond the act of passing the bill. By contrast, in the Fifth and Eleventh Circuits, the officer can arrest based on the passing of the bill without additional evidence of intent beyond the passing itself. This is a square conflict among the circuits on an important issue, and for the reasons stated in the Petition, the split is worthy of certiorari.

2. Should the Court decline to grant certiorari on the first question presented, it still should hold the Petition for decision in *Pearson*. Respondent attempts to distinguish the Ninth Circuit's ruling on qualified immunity from *Pearson* by citing numerous "facts"

that (i) are inaccurate, and (ii) in any event were not mentioned in the decision below. Petitioners will not, in this brief, refute the numerous inaccurate factual assertions by Respondent, because those assertions do not change the fact that in both *Pearson* and the decision below, the courts defined the applicable right at the highest level of generality possible, thereby creating an analytical framework that made the denial of qualified immunity a logical inevitability. Moreover, in both cases the courts denied qualified immunity despite the fact that the only cases on point at the time had concluded that similar conduct *did not* amount to a constitutional violation. These factors are dispositive of the qualified immunity issue, and Respondent has said nothing to refute either of them. Indeed, the similarities are so stark that the Court, assuming that it reverses the Tenth Circuit in *Pearson*, should, as it did in *Brosseau v. Haugen*, 543 U.S. 194 (2004), summarily reverse the decision below rather than granting, vacating, and remanding.

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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